In the Supreme Court

OF THE

United States

OCTOBER TERM 1978

No. 77-1547

DOUGLAS OIL COMPANY OF CALIFORNIA AND
PHILLIPS PETROLEUM COMPANY,
Petitioners,

vs.

PETROL STOPS NORTHWEST; GAS-A-TRON OF ARIZONA;
COINOCO; UNITED STATES OF AMERICA,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

By this petition defendants in private antitrust actions seek to deny their adversaries access under a "stringent" protective order to grand jury materials already disclosed to the defendants and in their possession, claiming considerations of grand jury secrecy warrant their advantage.

QUESTIONS PRESENTED

A. Whether under Rule 6(e), Federal Rules of Criminal Procedure, a district court abused its discretion by ordering production of grand jury materials to plaintiffs' counsel in private antitrust actions when

1. The indictment and complaints include virtually identical charges of price fixing against the defendants;

2. The criminal proceedings had concluded with the indictment and conviction of the defendants on *nolo* pleas;

3. The only grand jury materials ordered produced were transcripts already disclosed to the defendants and documents produced by the defendants;

4. The defendants denied the charges of price fixing in the private actions and denied under oath in those actions having any communication with each other concerning prices; and

5. Production was proscribed under a protective order which

a. Limited disclosure to plaintiffs' counsel; and

b. Limited use by counsel to testing or attacking credibility.

B. Whether under Rule 6(e), Federal Rules of Criminal Procedure, a district court charged with supervision of a grand jury is compelled to refer a Rule 6(e) petition by a plaintiff in a private antitrust action to the district court before which the antitrust action is pending.

C. Whether defendants to a concluded criminal proceeding have any standing to challenge an order pursuant to Rule 6(e), Federal Rules of Criminal Procedure, requiring the government to produce grand jury materials.

STATEMENT OF THE CASE

A. Parties and Proceedings Below

Respondents, Petrol Stops Northwest ("Petrol Stops"), Gas-A-Tron of Arizona ("Gas-A-Tron"), and Coinoco, and petitioners, Douglas Oil Company ("Douglas") and Phillips Petroleum Company ("Phillips"), are respectively plaintiffs and defendants in two private antitrust actions pending in the United States District Court for the District of Arizona. Petrol Stops, Gas-A-Tron and Coinoco, related companies, are independent retail marketers of gasoline. (A. 130, 149-150)[1] Phillips and Douglas, a wholly-owned subsidiary of Continental Oil, are major oil companies. (A. 131, 135-36.) Gas-A-Tron and Coinoco are plaintiffs in *Gas-A-Tron v. Union Oil Company of California,* Civil No. 73-191 TUC-WCF (D. Ariz.) (*"Gas-A-Tron"*), filed on November 2, 1973 and assigned to the Honorable William C. Frey. (A. 148-167) Petrol Stops is the plaintiff in *Petrol Stops Northwest v. Continental Oil Company,* Civil No. 73-212 TUC-JAW (D. Ariz.) (*"Petrol Stops"*) filed on December 13, 1973 and assigned to the Honorable James A. Walsh. Phillips is a defendant in both actions. Douglas is a defendant in Petrol Stops[2]. A motion to add Douglas as a party defendant in *Gas-A-Tron* has been pending for almost one year.

Discovery in *Gas-A-Tron* and *Petrol Stops* was stayed for over two years pending an unsuccessful attempt to disqualify plaintiffs' counsel. *Gas-A-Tron of Arizona v. Union Oil Company of California,* 534 F.2d 1322 (9th Cir. 1976), *cert. denied,* 429 U.S. 861 (1976). During this stay, on

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[1] The following abbreviations are used for the purpose of citation in this Brief: (1) "A." refers to the joint Appendix; (2) "R.A." refers to the Appendix included within the Brief of Respondents.

[2] Petrol Stops, Gas-A-Tron and Coinoco are referred to in this Brief as plaintiffs, and Douglas and Phillips as defendants.

March 19, 1975, Phillips and Douglas were both indicted in the Central District of California in *United States v. Phillips,* Criminal Docket No. 75-377 (C.D. Cal.) (A. 118-122) On the same day the government filed a companion civil complaint. (A. 123-128)

The criminal proceedings were concluded with the entry by Phillips and Douglas of ***nolo contendere*** pleas on December 3, 1975. (A. 69) Each defendant was fined $50,000. The companion civil case was terminated by the entry of a consent decree. (A. 69)

The plaintiffs in *Gas-A-Tron* and *Petrol Stops* filed a Rule 6(e) petition on December 1, 1976 in the United States District Court for the Central District of California against the government seeking certain grand jury materials in *United States v. Phillips, supra.* (A. 114-117) The plaintiffs filed the Rule 6(e) petition in that court rather than in the Arizona actions, because as the circuit court recognized, they believed that was the proper court in which to proceed to gain access to the grand jury materials. (A. 3, 70-71) The Rule 6(e) petition sought only the production of grand jury transcripts that had previously been produced to Douglas and Phillips as criminal defendants in *United States v. Phillips, supra,* and documents produced by Phillips and Douglas to the grand jury in that criminal proceeding. (A. 115) These grand jury materials are still in the defendants' possession. (A. 100)

The government did not oppose the Rule 6(e) petition on the ground plaintiffs had made a sufficient showing of "particularized need." (A. 99-100) Phillips and Douglas did *not* petition to intervene but appeared "as real parties in interest" in opposition.

The Rule 6(e) petition was assigned to the Central District's miscellaneous docket and after extensive brief-

ing, was called on for hearing. The judge conducted the hearing in the form of Socratic colloquy with counsel for the purpose of testing the court's tentative conclusions with regard to the Rule 6(e) petition. The defendants' summary of the hearing before the district court is not only inaccurate but unfair to the thoughtful attention given by the court to its ruling on the Rule 6(e) petition. (Compare Petitioners' Br. at 6-7, 21-28, with A. 52-64)

The court, contrary to the defendants' contention (Petitioners' Br. at 2, 7, 21-23) was not unconcerned with whether the requested materials were relevant to the claims in *Gas-A-Tron* and *Petrol Stops,* but concluded they were relevant on the ground that the price fixing violation charged in the indictment was substantially the same as those included in the complaints in *Gas-A-Tron* and *Petrol Stops.* At no time did the defendants ever suggest that the grand jury materials that were in their possession were irrelevant to the claims in *Gas-A-Tron* or *Petrol Stops,* nor did the defendants request that the court examine any of those materials *in camera* to determine whether they were irrelevant. *The defendant, moreover, did not accept Judge Gray's offer that he would, at the defendants' request, contact Judge Walsh and Judge Frey to determine whether they had any concern or objection to his proceeding to dispose of the issues raised by the Rule 6(e)petition—"I would be very glad through an overabundance of precaution, if you think it would be appropriate, to telephone Judge Walsh and Judge Frey to see if they have any objection . . . ."* (A. 56, 58)

The district court concluded in view of the prior disclosure of the requested grand jury materials to the defendants there was no continued reason for grand jury secrecy. At no time did the defendants suggest that the disclosure of any of the materials in their possession to

plaintiffs' counsel raised any risk in terms of the reasons for grand jury secrecy nor did they suggest that the court examine any of the material *in camera* to determine whether there was any reason for continued secrecy.

The district court concluded that under Rule 6(e) it was the proper court to hear the plaintiffs' petition. The defendants did not question the court's power to decide the petition. (A. 55) The defendants told the court, "As far as the jurisdictional question, your Honor, we do not challenge the Court's jurisdiction." (A. 63)

The defendants' repeated contention "the district court erred in ordering the production of the *entire* transcripts" (Petitioners' Br. at 26, 27, 13-15) is false. The district court only ordered the production of grand jury transcripts in *United States v. Phillips, supra,* that had been disclosed to Douglas and Phillips and documents that had been produced by defendants. (A. 48-49) The district court further granted access only to those materials under a protective order that limited disclosure to plaintiffs' counsel and use of such materials for the purpose of impeachment, refreshing recollection, and testing credibility (A. 2, 48-49) and required the return of the materials upon the conclusion of the litigation.

The defendants appealed, and the Ninth Circuit affirmed. *Petrol Stops Northwest v. United States,* 571 F.2d 1127 (1978), *cert. granted sub nom., Douglas Oil Co. of California v. Petrol Stops Northwest,* 98 S. Ct. 3087 (1978). The Ninth Circuit held (1) the defendants had standing to appeal, (2) the district court charged with supervision of the grand jury was the proper court to rule on a Rule 6(e) petition, (3) a showing of "particularized need" was required for the disclosure of grand jury materials, (4) the determination of "particularized need" required a balancing of the public interests served by continued grand jury secrecy against the plaintiffs' need for the information, (5) the need for secrecy was at best "light" since Douglas and Phillips had already examined the materials requested, (6) the plaintiffs had demonstrated a "particularized need" beyond the relevance of the materials since the grand jury materials might well contradict Douglas' and Phillips' answers to interrogatories, (7) inconsistencies between depositions taken after the district court's order and the government's Bill of Particulars strengthened the showing of "particularized need", and (8) the carefully limited disclosure granted under a "stringent" protective order was not an abuse of the district court's discretion.

B. The Indictment and Complaints Included Identical Charges of Price Fixing

In *Petrol Stops* the plaintiff brought an antitrust action against 11 major oil companies and Armour Oil Company, claiming violations of Sections 1 and 2 of the Sherman Act. (A. 129-147) The complaint in *Petrol Stops* alleged Petrol Stops was engaged as an independent marketer in the retail distribution of gasoline in California, Oregon, Washington, and Arizona, and several other states. (A. 130-141) Prior to 1973 Petrol Stops marketed gasoline through 104 gasoline stations with an annual volume of approximately 70 million gallons. (A. 130) Petrol Stops was supplied by the defendant Armour Oil, and Armour, in turn, was supplied by the defendants Douglas and Gulf. (A. 136) Gulf was named as a co-conspirator in the government's Bill of Particulars. (R.A. 3) The focus of the antitrust violations charged in *Petrol Stops* were the States of California, Oregon, and Washington. (A. 138, 140-141) The antitrust violations alleged in the *Petrol Stops* complaint specifically included the charges:

> The defendants and their co-conspirators, with the specific intent of suppressing and eliminating the competition of independent marketers of gasoline, have combined and conspired to fix and control the price at which independent marketers purchased gasoline for resale in California, Oregon, and Washington. (A. 140-141, para. 16K)

and

> The defendants and their co-conspirators have combined and conspired to fix, raise and maintain the price of gasoline charged independent marketers of gasoline, including the plaintiff. (A. 141, para. 16N)

The complaint also charged the defendants and their co-conspirators with engaging in predatory marketing violations on the sale of gasoline with the specific intent of controlling the prices of their independent competitors including the plaintiff. (A. 141-142, paras. 16 0-R, 16T)

The complaint in *Gas-A-Tron* contained similar allegations but focused on the marketing of gasoline in Tucson, Arizona. (A. 149, 155-157) Gas-A-Tron and Coinoco, as in the case of Petrol Stops, were engaged in the retail distribution of gasoline as independent marketers. (A. 149-150) Gas-A-Tron and Coinoco marketed gasoline through 28 retail units and had an annual sales volume in excess of 13 million gallons. (A. 149-150) The alleged violations in *Gas-A-Tron* specifically included the claim the defendants and their co-conspirators had combined and conspired "to fix and control the price at which independent marketers purchased gasoline for resale in Tucson, Arizona." (A. 158, para. 15 L; A. 160, paras. 15 Q (9) & (10). The complaint in *Gas-A-Tron* also charged the defendants and their co-conspirators with predatory marketing violations

in the sale of gasoline for the purpose of controlling the gasoline prices of independent marketers at wholesale and retail in the Tucson market. (A. 155-160, para. 15)

The indictment in *United States v. Phillips, supra,* charged Douglas and Phillips, four other named defendants and unnamed co-conspirators with a "combination and conspiracy . . . to increase, fix, stabilize and maintain the price of rebrand gasoline" in the states of California, Oregon, Washington, Nevada and Arizona. (A. 121) The indictment defined "rebrand gasoline" as gasoline "sold for resale in service stations under a trademark or brand name not owned or controlled by an oil refiner." (A. 118) The indictment charged the defendants "sold rebrand gasoline . . . to buyers who either resell the gasoline through service stations directly to the public or who resell the gasoline to service stations for ultimate resale to the public." (A. 120) The indictment, thus, charged the defendants and their co-conspirators had engaged in a price fixing conspiracy at different distribution levels in the marketing of "rebrand gasoline" including the sale of "rebrand gasoline" to retail marketers, and the defendants told the district court, "It is the fact that those grand jury proceedings concerned a number of different levels of sale, both at the wholesale and retail levels, ..." (A. 57)

The plaintiffs as "independent" marketers (A. 139, 141) market gasoline at retail gasoline stations under their own brand name. In terms of the indictment they are retailers of "rebrand gasoline."

The indictment and complaints charged the gasoline buying prices of such retailers were fixed. The combination and conspiracy charged in the criminal indictment was not identical to all the antitrust violations charged in *Gas-A-*

Tron and Petrol Stops. The price fixing conspiracy charged in the indictment, however, was included in the price fixing violations alleged in the civil complaints and evidence supporting the price fixing conspiracy charged in the indictment would be relevant not only to those specific violations, but to other predatory violations charged in the civil complaints.

C. There Was No Reason for Continued Secrecy

The limited disclosure of grand jury materials sanctioned under what the court of appeals characterized as a "stringent" protective order did not violate any policy supporting grand jury secrecy. There was simply no reason for secrecy. The criminal proceedings had concluded. The grand jury transcripts had already been disclosed to corporate employers. (A. 100, 108) Disclosure was limited to attorneys and use of the materials was limited to impeachment, refreshing recollection, and testing credibility. (A. 2, 48-49) If a witness who testified before the grand jury testified truthfully in the antitrust actions, there was no added risk of retaliation by the disclosure authorized, and correspondingly, no impediment to full disclosure before future grand juries. The government informed the court that a sufficient "particularized need" for the disclosure requested had been demonstrated and the defendants who had the materials never suggested to the court that their disclosure would raise any actual additional risk of retaliation.

The defendants in their brief for the first time argue the disclosure ordered endangered another interest sheltered by grand jury secrecy—the need to protect an innocent accused from exposure of a prior criminal investigation. This argument was not made to the lower courts.

The defendants never suggested that the materials in their possession actually raised any such risk. The argument, moreover, is predicated on a faulty premise. The defendants' argument, as stated in their brief, is based on the assumption the disclosure ordered encompassed "the entire text of grand jury transcripts." (Petitioners' Br. at 13-14, 26, 27) The district court did not order the disclosure of the entire text of the grand jury transcripts. Only the transcripts of the testimony of employees and former employees of the defendants that had been disclosed to the defendants were ordered produced under the court's order. (A. 48-49) Rule 16 of the Federal Rules of Criminal Procedure insures that such disclosure to corporate employers does not endanger the interest of any innocent accused by providing only those portions of employee witness transcripts that are "relevant" to the offense charged are to be released. The defendants are not innocent accused, and if the grand jury transcripts of their employee witnesses contained accusations against any person exonerated by the grand jury, those portions would not be disclosed to the defendants in the first place.

D. The Grand Jury Materials Were Necessary to Contradict the Defendants' Sworn Testimony Categorically Denying Any Price Related Conversations or Communications

The defendants denied the alleged price fixing violations in *Gas-A-Tron* and *Petrol Stops.* The defendants, moreover, each denied under oath in answers to interrogatories ever having any conversation or communication with each other or any other major oil company "relating to gasoline prices or gasoline market conditions" and accordingly refused to identify any documents relating to any such conversations or to specify the participants or

substance of any such conversation or communication. (A. 83-85) The grand jury transcripts in the defendants' possession might well contradict these answers. Indeed, the Bill of Particulars filed by the government in *United States v. Phillips, supra,* claimed there were a legion of communications and conversations concerning gasoline prices and gasoline market conditions among the defendants in *United States v. Phillips, supra,* including over 11 specific conversations between Douglas and Phillips. (R.A. 8, 12, 17, 18, 21, 23-25, 28)[3]

Finally, the protective order of the district court, by limiting the use of the disclosed grand jury materials to impeachment, refreshing recollection, and testing credibility, guaranteed the materials would be used only for the "particularized need" of attacking or testing credibility.

[3] The pertinent portions of the Bill of Particulars are set forth in the Appendix to this Brief. The Bill was not formally made a part of the record before the district court on plaintiffs' 6(e) petition, but was part of that district court's records having been filed in *United States v. Phillips, supra.* The court of appeals referred to the Bill of Particulars in its opinion. (A. 7) The court of appeals under settled authority could refer to matters not formally in the record before the lower court which were subject to judicial notice. *See, Wells v. United States,* 318 U.S. 257, 260 (1943) (". . . [T]he Government's brief points out that petitioner, before his application to the district court in this proceeding, had unsuccessfully sought release from custody in two habeas corpus proceedings, of which the federal courts may take judicial notice. . . . We cannot say that the district court in this case was unfamiliar with those proceedings, merely because they do not appear in the record before us."); *Moore v. Estelle,* 526 F. 2d 690, 694 (5th Cir. 1976) ("In considering this habeas corpus appeal we take judicial notice of prior habeas proceedings brought by this appellant in connection with the same conviction. . . . This includes state petitions, . . . even when the prior state case is not made a part of the record on appeal."); *United States v. Merrick Sponsor Corp.,* 421 F.2d 1076, 1079, n.2 (2nd Cir. 1970) ("While this judgment of foreclosure was not part of the original record filed by the parties in this court, we can take judicial notice of it."); *St. Paul Fire and Marine Insurance Co. v. Cunningham,* 257 F.2d 731 (9th Cir. 1958) (". . . while the record in the instant case does not contain information as to when the appeal was taken, or the date of dismissal of the appeal, we get that information by taking judicial notice thereof as it appears in the records of the Superior Court of Mendocino County, California, and the District Court of Appeal."); *Cf. Landy v. Fed. Deposit Ins. Corp.,* 486 F.2d 139, 151 (3rd Cir. 1973); *Travis v. Pennyrile Rural Electric Cooperative,* 390 F.2d 726, 729 (6th Cir. 1968).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in granting private antitrust plaintiffs access under a "stringent" protective order to relevant grand jury materials already in their adversaries' possession.

"Particularized need" is still the test of access to grand jury materials. *Dennis v. United States,* 384 U.S. 855 (1966); *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395 (1959); *United States v. Procter & Gamble Co.,* 356 U.S. 677 (1958). Grand jury secrecy, however, is not an end in itself. The "particularized need" test requires a balancing of reasons supporting secrecy against those favoring disclosure. *Dennis v. United States, supra,* at 871-872 & nn. 17 & 18. Under this Court's decisions the balancing process is a relative one; as the reasons for continued secrecy diminish, the reasons for disclosure need not be as compelling. *Dennis v. United States, supra,* at 872.

The courts below properly applied the test of "particularized need". The Ninth Circuit in accord with the overwhelming trend of authority applied a standard of "relative need" and held a plaintiff in a private antitrust action was not required to demonstrate a great need to gain access to grand jury materials once the materials had been disclosed to corporate employers, and the plaintiff's use of those materials was limited to the purpose of attacking and testing credibility. This trend of lower court authority is not only persuasive precedent, it represents the informed experience of the lower courts who are charged with the responsibility of reconciling the competing interest of secrecy and truth in the administration of justice.

Why shouldn't the district court have granted access to these grand jury materials? There was no reason for continued secrecy. The termination of the criminal proceeding had eliminated most of the reasons for secrecy. The principal risk of retaliation had been realized by the disclosure of employee transcripts to their employers. The transcripts were still in the possession of the defendants without restriction as to the defendants' further disclosure to their sister oil companies. There was no additional risk of retaliation from disclosure to plaintiffs' counsel who were not only under a court order, but a professional obligation only to use the materials in the litigation for issues of credibility. If witnesses testified truthfully, the limited access granted raised no additional risk of retaliation.

The defendants' argument the access granted raised risk to any innocent accused is specious. Neither the government nor defendants ever suggested that the grand jury materials in their possession actually raised any such risk. The defendants' whole argument is premised on the false claim that the court ordered the production of the entire grand jury transcript. The court only ordered the production of grand jury transcripts disclosed to the defendants under Rule 16 of the Federal Rules of Criminal Procedure and that rule guarantees that only portions of transcripts "relevant" to the offense charged shall be disclosed.

The grand jury materials are relevant to the price fixing and predatory antitrust violations charged in the plaintiffs' complaints. If the plaintiffs only proved the offense charged in the indictment, they would, under their civil complaints, be entitled to rely on that claim of liability. There is a strong inference that the grand jury materials support the offense charged in the indictment and neither

the government nor the defendants have ever suggested they do not. If the materials are relevant to the offense charged in the indictment, they are also relevant to the allegations of price fixing and predatory pricing included in the civil complaints.

The government was correct in conceding the plaintiffs had made a sufficient showing of "particularized need." The proof of whether a defendant participated in a price fixing conspiracy is generally based on the defendant's price related conversations or communications with competitors, such proof is largely in the hands of the defendant and the defendants' employees. The defendants, while in the possession of their employees' grand jury transcripts, testified in answers to interrogatories they had not had any price related conversations or communications with each other or any other major oil company, including Gulf, an indicted co-conspirator and civil defendant. The plaintiffs are entitled to the same opportunity to impeach this critical testimony as they are to impeach the testimony of any individual witness. The grand jury materials might well contradict the defendants' sworn testimony, a classic need for the use of grand jury materials.

Where there is no further reason for grand jury secrecy, a protective order that limits the use of grand jury materials to the purpose of attacking or testing credibility independently satisfies the "particularized need" requirements of necessity for the use of grand jury materials. Grand jury materials are a unique source in the search for accurate and truthful testimony and the use of such materials for credibility purposes has long been recognized and approved by this Court. *Procter & Gamble, supra.* Any further requirement for access beyond the protective order itself would not further the ends of grand

jury secrecy and would only impede the just disposition of civil litigation. Can any requirement for access reasonably be imposed that assures grand jury transcripts will in fact be useful for the purpose of attacking or testing credibility other than giving counsel the opportunity to use them for that limited purpose? If access is delayed until trial, the plaintiffs would be deprived of the opportunity to use the materials against witnesses who may only be available for deposition. Certainly it would be impracticable to require a showing of contradiction before access was granted and this Court has already rejected any such requirement. *Pittsburgh Plate Glass Co., supra. In camera* inspection places the court rather than counsel in the adversarial role of determining whether the materials are in fact useful for attacking or testing credibility and this Court has already rejected any such requirement. *Dennis v. United States, supra.* A requirement that grand jury witnesses be deposed in the civil litigation before access to their grand jury transcripts is granted would only result in the delay of two depositions rather than one; for at some point only adversary counsel can determine whether a witness' prior testimony is useful for the purpose of impeachment.

The disclosure authorized furthers the public interest in the enforcement of the antitrust laws and is consonant with the "growing realization" that equal access between antitrust adversaries to grand jury materials sheltered by a protective order limiting use for issues of credibility is the proper reconciliation between the needs of secrecy and the search for the truth.

The district court below, as the district court charged with the supervision of the grand jury, was clearly cast with the authority if not the exclusive authority to rule on

petitions for access to grand jury materials under Rule 6(e). Beyond the question of power the district court charged with grand jury supervision was the court that should rule on access to grand jury materials, for that court is the court that must exercise responsibility for the protection of the public interest relating to grand jury secrecy. The defendants are simply wrong in contending that the court in which the private antitrust actions are pending can deal as adequately with the needs of grand jury secrecy as the court charged with the supervision of the grand jury. Certainly the district court charged with the supervision of the grand jury must exercise that responsibility during the pendency of the criminal proceeding, but its responsibility does not end there. It is the only court with access to the government employees directly responsible for the criminal prosecution, and that access can be important in determining whether there is any need for further secrecy. Only the government personnel in charge of the prosecution can know whether there are particular risks of retaliation, risks to an informant or agent which require further protection through the maintenance of secrecy. The interest of secrecy, moreover, will be better served if the responsibility for secrecy is centered in one district and not fragmented by the happenstance of civil litigation. Every lower court that has considered the issue has held that the district court charged with supervision of the grand jury is in the best position to determine whether there is any further interest in grand jury secrecy and no court has decided an application for access to grand jury materials without the prior approval of the district court with supervisory power over the grand jury.

The district court charged with the supervision of the grand jury is also fully capable of determining whether the grand jury materials in question are relevant to the

antitrust actions. The task is not formidable, and one to which district courts are accustomed. The relevancy of grand jury materials is determined just as any question of relevancy for the purpose of discovery, by the claims and defenses asserted in the private antitrust actions. District courts other than the district in which the action is pending frequently determine issues of relevancy for the purposes of discovery. Under Rule 45 of the Federal Rules of Civil Procedure, district courts are required to make determinations of relevancy for the purpose of ruling on deposition subpoenas. Rule 45(d)(1), Federal Rules of Civil Procedure.

Access to grand jury materials for the sole purpose of attacking or testing credibility raises no issues which compel reference of the plaintiffs' petition to the district court in which the antitrust actions are pending. In any event, the district court below offered to make inquiry of the district court in which the antitrust actions were pending to determine whether the judges assigned to those actions had any objection to the district court below proceeding to rule on plaintiffs' 6(e) petition, if the defendants desired the court to do so, but the defendants expressed no such desire. The district court was well within its discretion having made that offer to rule on plaintiffs' Rule 6(e) petition particularly when the access granted under its protective order only permitted use of the grand jury materials in the private antitrust actions for the purpose of attacking or testing credibility and thus did not in any way jeopardize the Arizona district court's control of the civil litigation.

The district court not only properly applied the test of "particularized need" in ruling upon plaintiffs' 6(e) petition, the defendants to a concluded criminal proceeding have no standing to challenge the district court's order

that the government provide access to grand jury materials. While the circuits are divided on the question of standing, grand jury secrecy is a matter of public interest not private right. The government is the party charged with the adversarial responsibility in protecting the public interest in grand jury secrecy and it would unreasonably burden the administration of Rule 6(e) to hold that defendants or grand jury witnesses to a concluded criminal proceeding have private standing to challenge petitions for access to grand jury materials.

ARGUMENT

I

THE COURTS BELOW PROPERLY APPLIED THE TEST OF "PARTICULARIZED NEED"

A. This Court Has Approved A "Relative Need" Analysis In Applying The Test Of "Particularized Need"

This Court in a triumvirate of decisions has considered the standards for access to grand jury materials "preliminarily to or in connection with a judicial proceeding" under Rule 6(e) of the Federal Rules of Criminal Procedure. *Dennis v. United States,* 384 U.S. 855, 870 (1965); *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395 (1959); *United States v. Procter & Gamble Co.,* 356 U.S. 677 (1958). (The issue of access arose under Rule 34, Federal Rules of Civil Procedure, but this Court has treated the decision as being equally applicable to the arguments of 6(e). *Dennis v. United States, supra,* at 869-70).

In *Procter & Gamble* this Court rejected pretrial disclosure of an entire grand jury transcript to civil antitrust defendants for general discovery purposes where the only

need for disclosure advanced was the availability of the transcript to the government in the preparation of its case. *See, Dennis v. United States, supra,* at 869. The next year the Court affirmed a trial court's denial of access to a key witness's grand jury testimony in a criminal trial where the defendants insisted without any showing of need they were entitled to the transcript as a matter of right and where there was other "'overwhelming'" proof of the offense charged. *See, Dennis v. United States, supra,* at 869. Seven years later the Court, accepting "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice," rejected a trial court's denial of access to the grand jury transcripts of key government witnesses in a criminal case. *Dennis v. United States, supra,* at 870[4].

These cases, while establishing general principles controlling access to grand jury materials are not squarely in point. In *Procter & Gamble,* the transcripts had not previously been disclosed to the witnesses' corporate employers, and the entire grand jury transcript was requested for general discovery purposes. The Court stated that disclosure of witnesses' testimony to employers presented a real risk of retaliation and a valid reason for continued secrecy. The disclosure, moreover, was for general discovery purposes, and the Court itself drew a distinction between the use of grand jury materials as a substitute for discovery rather than their use for the particularized purpose of attacking or testing credibility. *See, United States v. Procter & Gamble Co., supra,* at 683. *Pittsburgh Plate Glass Co.* and *Dennis* were both criminal cases and while criminal defendants and civil litigants have a common

[4] The lower courts have regarded *Dennis* as having overruled *Pittsburgh Plate Glass Co. United States v. Youngblood,* 379 F.2d 365 (1967); *Allen v. United States,* 390 F.2d 476 (1968).

interest in truthful and accurate testimony, the risk of personal liberty may make the interest of the criminal defendant more acute. Access to the testimony of prosecution witnesses, moreover, is now governed by the Jencks Act as amended in 1970 which requires disclosure without a showing of "particularized need." 18 U.S.C. § 3500(a), (e)(3).

These three decisions are nevertheless important, because they represent this Court's evolution of the test of "particularized need." The test of "particularized need" was first formulated in *Procter & Gamble* and the Court in that decision explicitly sanctioned as examples of "particularized need" the use of grand jury transcripts for the purpose of attacking or testing credibility. *United States v. Procter & Gamble Co., supra,* at 683. In *Pittsburgh Plate Glass Co.* the Court affirmed the "particularized need" test and held that a criminal defendant had no absolute right of access. Mr. Justice Brennan dissented in *Pittsburgh Glass Co.* in an opinion in which three other justices joined. The dissent adhered to the "particularized need" test (*Pittsburgh Plate Glass Co. v. United States, supra,* at 405), but forcefully argued the proper application of that test required (1) an analysis of whether there was any reason for further secrecy, and (2) an analysis of whether any further reason for secrecy was outweighed by the need for disclosure. The dissent, in short, approved a "relative need" analysis in the application of the "particularized need" test. The dissent recognized that in determining "particularized need" the competing considerations of secrecy and disclosure were relative and as the need for further secrecy diminished, the requisite need to warrant disclosure could become less compelling. The method of analysis utilized by the dissent in *Pittsburgh Plate Glass Co.* is important, because it was explicitly adopted by the

court in *Dennis*. *Dennis* not only cited Mr. Justice Brennan's critical analysis of the reasons for further secrecy with approval (*Dennis v. United States, supra,* at n. 18), but the Court itself employed a "relative need" analysis in requiring disclosure.

B. The "Relative Need" Test Employed By The Ninth Circuit Below Is Not A Test Of "Slight Need" And Is In Accord With The Overwhelming Trend Of Authority

The Ninth Circuit in the opinion below held a showing of "particularized need" was required. The circuit did not adopt a "slight need" standard as claimed by the defendants (Petitioners' Br. at 19-21), but a standard of "relative need"—"'[I]f the reasons for maintaining secrecy do not apply at all in a given situation, or apply only to an insignificant degree, the party seeking disclosure should not be required to demonstrate a large compelling need.'" (A. 5) The circuit found, in applying its standard of "relative need", the public interest in further secrecy in terms of the disclosure authorized was "lightly weighted." (A. 7) The circuit reached that conclusion on the ground that (1) the criminal proceeding had been concluded, and (2) the grand jury transcripts of the defendants' employees had already been disclosed to the defendants.

The Ninth Circuit's decision is in accord with the overwhelming trend of lower court authority. Case after case in the lower courts have granted private antitrust plaintiffs access to relevant grand jury materials when (1) the criminal proceedings have concluded, (2) the materials have already been disclosed to the plaintiff's adversaries, and (3) a protective order restricts the use of such

materials to impeachment, refreshing recollection, and testing credibility. *State of Illinois v. Sarbaugh,* 552 F.2d 768 (7th Cir. 1977), *cert. denied,* 434 U.S. 889 (1977); *U. S. Industries, Inc. v U. S. District Court,* 345 F.2d 18 (9th Cir. 1965); *Little Rock School District v. Borden, Inc.,* 1978-1 Trade Cases (CCH) ¶ 62,020 (E.D. Ark. Apr. 28, 1978) (grand jury had not even concluded deliberations, but transcripts had already been released to defendants); *In re Sugar Antitrust Litigation,* 1977-2 Trade Cases (CCH) ¶ 61,808 (N.D. Cal. Dec. 22, 1977); *In re Folding Carton Antitrust Litigation,* 1977-2 Trade Cases (CCH) ¶ 61,807 (N.D. Ill. Jun. 30, 1977); *In re Arizona Dairy Products Litigation,* 1976-2 Trade Cases (CCH) ¶ 61,177 (D. Ariz. Nov. 22, 1976) (defendants had not even obtained the transcripts); *Boise City, Idaho v. Monroe, Inc.,* 1976-2 Trade Cases (CCH) ¶ 61,178 (D. Idaho Nov. 16, 1976) (no protective order); *In re Sugar Antitrust Litigation,* 1976-1 Trade Cases (CCH) ¶ 60,934 (N.D. Cal. Jun. 10, 1976); *United States v. Saks & Co.,* 1976-1 Trade Cases (CCH) ¶ 60,741 (S.D.N.Y. Feb. 16, 1976); *In re Arizona Dairy Products Litigation,* 1976-1 Trade Cases (CCH) ¶ 60,910 (D. Ariz. Dec. 2, 1975); *In re Toilet Seat Antitrust Litigation,* 1975-2 Trade Cases (CCH) ¶ 60,557 (E.D. Mich. Oct. 20, 1975); *In re Cement-Concrete Block Chicago Area, Grand Jury Proceedings,* 381 F. Supp. 1108 (N.D. Ill. 1974); *State of Connecticut v. General Motors,* 1974-2 Trade Cases (CCH) ¶ 75,138 (N.D. Ill. Apr. 29, 1974) (protective order not limited to impeachment, refreshing recollection, and testing credibility). These decisions conclude that once the transcripts have been disclosed to corporate employers there is no longer any significant need to guard against the risk of retaliation and any such residual risk can be sheltered by the terms of the protective order. These decisions find that it is only fair if all sides have equal access to relevant information and a protective

order proscribing the use of the disclosed materials assures they will be used only for the "particularized need" of attacking or testing credibility. These decisions hold that disclosure in these circumstances serves the interest of justice in securing accurate and truthful testimony without compromising the public interest in grand jury secrecy.

The only lower court decision contrary to this uniform line of authority is the Fifth Circuit's decision relied upon by the defendants in *State of Texas v. United States Steel Corporation*, 546 F.2d 626 (5th Cir. 1977) *cert. denied*, 434 U.S. 889 (1977). In *United States Steel Corporation*, the Fifth Circuit reversed an order granting access holding that the prior disclosure to corporate employers standing alone did not establish "particularized need" and requiring the plaintiffs to draw "a finer bead." The foundation of the Fifth Circuit's decision was its rejection of the argument that disclosure of grand jury transcripts to a corporate employer raises the risk of retaliation and hence such prior disclosure eliminates the principal reason for further secrecy. Specifically, the circuit stated,

> This argument ignores the usual case in which corporate spokesmen . . . appear before a grand jury representing and speaking for the corporation, indeed in a real sense are the corporation on such an occasion. When the corporation, in such a case, acquires transcripts of its spokesmen's testimony, it acts in a capacity little different from an individual defendant who seeks his own transcript. *State of Texas v. United States Steel Corporation, supra*, at 630.

The Fifth Circuit's rejection of the argument that disclosure to corporate employers raises the risk of retaliation that will chill full disclosure to future grand juries is contrary to the risk of corporate reality, has been uniformly repudiated by all other lower federal court decisions on

point, and has been repudiated by this Court's decision in *Procter & Gamble* which premised the creation of the test of "particularized need" on that very risk of retaliation. ***United States v. Procter & Gamble Co., supra,*** at 682.

The overwhelming trend of lower court authority supporting the decision below represents persuasive precedent, but perhaps even more importantly it represents the cumulative experience of courts charged with the day-by-day responsibility of reconciling the competing interest of secrecy and disclosure. There is no question that in antitrust cases, access to grand jury transcripts has been useful if not vital in securing accurate and truthful testimony; as counsel in the electrical cases wrote, "Amazingly enough, . . . once the witnesses learned that their grand jury testimony was to become an open secret, their memories rapidly improved. Often the clarity of the testimony miraculously improved without any review by the witness of his grand jury transcript." Hanley, *Obtaining and Using Grand Jury Minutes In Treble Damage Antitrust Actions*, 11 ANTITRUST BULLETIN 659, 671 (1966). On the other hand, there has not even been a suggestion in the decided cases or secondary comment that the access granted to grand jury transcripts in private antitrust litigation has in any way compromised the viability of the institution of the federal grand jury.

C. The Access Granted Under The Protective Order Of The District Court Did Not Invade Any Of The Reasons For Grand Jury Secrecy

Since the criminal proceedings in *United States v. Phillips, supra,* had concluded, the only reasons for grand jury secrecy remaining were to avoid the risk of retaliation with a view toward encouraging future grand jury

disclosure and to protect any innocent accused who may have been exonerated by the grand jury. Neither of these reasons were endangered in this case[5]. The access granted under the court's order raised no risk of retaliation or any risk of exposure to any innocent accused and the government and the defendants who had the materials in their possession have never suggested that those materials raise any such risk.

The district court's protective order only granted plaintiffs access to documents produced by defendants to the grand jury and grand jury transcripts of the defendants' employees and former employees already disclosed to the defendants pursuant to Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure. The transcripts were still in the defendants' possession without any restriction as to their use.

Since the transcripts in question had already been disclosed to the defendant-employers, there was no further risk of retaliation from that quarter by reason of the district court's order. It is true competitors and customers may also be a source of retaliation, but while there was nothing to prevent the defendants from making any such disclosure, the district court's protective order prevented

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[5] The documents produced by the defendants do not raise the same considerations of grand jury secrecy that transcripts of grand jury witnesses do. Although some secondary comment has included documents produced pursuant to grand jury subpoena within the category of grand jury materials (68 J. Crim. L.C. & P.S. 399-400 (1977), a question may be raised as to whether such documents are grand jury materials subject to the shroud of grand jury secrecy. *In re Cement-Concrete Block Chicago Area, Grand Jury Proceedings*, 1974-1 Trade Cases (CCH) ¶ 75,130 (N.D. Ill. Jun. 25, 1974) ("'The [documents] exist as an entity apart from the grand jury; the information contained therein does not reflect upon and is not inextricably intertwined with the deliberation or work of the grand jury.'") *Id* at ¶ 75, 132. The only justification for according such documents the protection of grand jury materials would be that the documents produced pursuant to grand jury subpoena may disclose a pattern of grand jury investigation.

plaintiffs' counsel from doing so. The protective order of the district court was not only enforced by the court's power of contempt, but by plaintiffs' obligations of professional responsibility. CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule, DR 7-102 paras. (A) (7) & (8). The protective order of the district court limited the use of the grand jury materials to attacking or testing credibility. If witnesses before the grand jury testified truthfully at their depositions or trial, the disclosure made raised no additional risk of retaliation beyond their own testimonial obligation, for as Wigmore observes, "If he tells the truth and the truth is the same as he testified before the grand jury, the disclosure of the former testimony can not possibly bring to him any harm . . . which his testimony . . . does not equally tend to produce." 8 WIGMORE, *Evidence* § 2362, at 736 (McNaughton rev. 1961) The disclosure granted under the district court's protective order raised no additional risk of retaliation.

The defendants for the first time suggest in their brief that the access granted endangered another reason for grand jury secrecy, the need to protect the innocent accused from exposure. The defendants' contention is premised, as it must be, on the false contention that the district court ordered the production of the entire grand jury transcript. (Petitioners' Br. at 13, 26, 27.) The district court did not order access to the entire grand jury transcript, it only ordered access to the grand jury transcript that had been disclosed to the defendants in *United States v. Phillips, supra,* under Rule 16(a)(1)(A) of the Federal Rules of Criminal Procedure. That rule specifically provides that only those portions of the grand jury transcript of the defendant-employees that are "relevant" to the offense charged shall be disclosed to employer-defendants. Consequently, even if this grand jury exon-

erated some innocent accused or exonerated the defendants of violations that were not charged in the indictment, transcripts relating to those circumstances were never disclosed to the defendants in the first place and their exposure would not be jeopardized by the court's order. There was simply no reason in terms of the policies sheltering grand jury materials why these materials should not have been disclosed under the protective order of the district court.

D. The Grand Jury Materials Were Relevant To The Price Fixing And Predatory Pricing Antitrust Violations Alleged In The Civil Complaints

The plaintiffs are independent retail marketers of gasoline. They purchase and resell gasoline under their own brand names. or in terms of the indictment, market rebrand gasoline. The complaint in *Petrol Stops* specifically alleged Petrol Stops' primary supplier of gasoline was in turn supplied by Douglas and Gulf, an indicted co-conspirator. The civil complaints included the charge the defendants had combined and conspired to fix the price of gasoline sold to independent marketers, including the plaintiffs. Both complaints further charged the defendants with engaging in various predatory marketing violations for the specific purpose of controlling the gasoline prices of independent marketers, including the plaintiffs.

The indictment charged the defendants with engaging in a conspiracy to fix the price of rebrand gasoline, including the price of gasoline sold to independent retailers, such as the plaintiffs, in the same area and at the same time as the price fixing conspiracies charged in the civil complaints.

The antitrust violations and parties charged in the civil complaints were not identical with the violation or parties charged in the indictment. The price fixing violation charged in the indictment, however, was included in the price fixing violations alleged in the civil complaints. If the plaintiffs did no more than prove they were injured by reason of the price fixing violation charged in the indictment, they would be entitled to recover against the defendants under that theory based on their civil antitrust complaints.

Identity is not an essential requirement of relevancy. The parties and the violations charged do not have to be the same in order for the grand jury materials in the indictment to be relevant to the civil claims. The indictment need only be included within the civil claims or a material element of such claims in order to demonstrate that the grand jury materials are relevant. Relevancy is established on the premise that the grand jury materials support the indictment, as the circuit said, ". . . there is a strong inference that the grand jury materials support the government's charges." (A. 7) If the grand jury materials support the offense charged in the indictment, and that offense is included in the claims made in the civil complaint or is a material component of such claims, the grand jury materials are relevant.

Even if the defendants have standing, the government is the party primarily charged with protecting the public interest represented in grand jury secrecy. The government, of course, was cognizant of the contents of the grand jury materials in question and represented to the court that the plaintiffs had made a sufficient showing of "particularized need". While the government's concession is not binding on the district court, it certainly corroborates the district court's determination of relevancy.

E. The Plaintiffs Sufficiently Demonstrated A "Particularized Need" For The Grand Jury Materials

The government was correct in conceding the plaintiffs had made a sufficient showing of "particularized need". The antitrust violations alleged in the civil complaints included the charge that the defendants had engaged in a price fixing conspiracy. Participation in such a conspiracy is normally, of course, largely in the hands of the defendants and their employees. *Poller v. CBS,* 368 U.S. 464 (1962). The defendants denied the charge of price fixing and the plaintiffs propounded interrogatories to the defendants asking whether the defendants had engaged in any price-related conversations or communications with each other or any other major oil company. The defendants, who are required under Rule 33, Federal Rules of Civil Procedure, to furnish "such information as is available", each categorically denied, under oath, having had any such conversation or communication. (A 83-85) The defendants, with the grand jury materials in their possession, stood upon this testimony. *Cf.,* Rule 26(e), Federal Rules of Civil Procedure. The defendants are bound by the same testimonial obligation as an individual witness, and the plaintiffs are entitled to the same opportunity for impeachment.

Since the grand jury materials, that is, the documents produced by the defendants to the grand jury, and the testimony of the defendants' employees to the grand jury might well contradict their answers to interrogatories, plaintiffs' access to the grand jury materials was necessary to afford the plaintiffs an opportunity to impeach. The opportunity to impeach is, of course, a classic example of "particularized need". *Procter & Gamble, supra* at 683. The likelihood that these grand jury materials would

serve as a basis for such impeachment was substantiated by the Bill of Particulars in *United States v. Phillips, supra.* The government in the Bill of Particulars listed over 11 specific conversations between Douglas and Phillips that would have been precisely covered by the plaintiffs' interrogatories.

F. The Protective Order Restricting The Use Of Grand Jury Materials For The Purpose Of Attacking And Testing Credibility Satisfied The Requirements Of Necessity For The Use Of Grand Jury Materials

Where there is no further reason for grand jury secrecy the requisite necessity for the use of grand jury materials is satisfied by a protective order restricting use for the purpose of attacking or testing credibility. The district court's protective order, by restricting the use of the grand jury materials by counsel for the sole purpose of attacking or testing credibility, properly balanced the interests of secrecy and disclosure. The use of grand jury materials for the purpose of impeachment, refreshing recollection, and testing credibility have long been recognized as examples of the "particularized need" for the use of grand jury materials. *Procter & Gamble, supra.* The use of such materials for credibility purposes serves the interest of justice in securing accurate and truthful testimony. Grand jury materials are a unique source for achieving these goals. The investigatory resources of the government are greater than civil litigants and while theoretically the testimonial obligation before the grand jury and in civil litigation is the same as a practical matter, witnesses tend to be far more forthcoming in their grand jury appearances. How many perjury prosecutions result from testimony in private antitrust litigation?

A protective order that restricts the use of grand jury materials by counsel for the purpose of attacking or testing credibility satisfies any valid requirement that such materials are necessary for that purpose, for it is the only practical alternative for assuring that grand jury materials are necessarily useful for the purpose of cross-examination. If there is no further reason for secrecy and if the use of relevant grand jury materials for credibility purposes serves the search for accurate and truthful testimony, why should any additional requirement of necessity be imposed for access to grand jury materials beyond a protective order that guarantees the materials will only be used for the purpose of attacking or testing credibility? Any further requirement for access will only hedge grand jury secrecy with artificial barriers that have either already been rejected by this Court or that will merely delay the ultimate use of the materials for the recognized need of cross-examination.

Basically there are only five alternatives for determining whether relevant grand jury materials are necessary for the purpose of attacking or testing credibility—(1) access can be denied until a witness who testified before the grand jury testifies at trial, (2) access can be denied until there is an independent showing of contradiction or lack of recollection, (3) access can be denied unless the court determines by *in camera* inspection the grand jury materials will in fact be useful for purposes of cross-examination, (4) access can be denied until a grand jury witness has first been deposed in the civil litigation, and (5) access can be granted to counsel under a protective order that limits the use of grand jury materials solely for the purpose of attacking or testing credibility.

If access is delayed until trial, the plaintiffs will be deprived of the opportunity of using the materials for the

purpose of attacking or testing the credibility of witnesses that are only available by deposition, and cross-examination based on such materials will not be available to counter attempts at summary disposition. This Court has already recognized that it would be impracticable to require a showing of contradiction before access is granted. *Pittsburgh Plate Glass Co., supra.* Such a requirement would truly put the cart before the horse. *In camera* inspection is unsatisfactory and this Court has so held. *Dennis, supra.* Counsel, and not the court, must make the adversarial determination of whether the grand jury materials are useful for the purpose of cross-examination. If prior deposition was a requirement to access, plaintiffs would ultimately gain access to grand jury transcripts and the only result would be two depositions instead of one. What purpose will be served by requiring a party to go through the process of deposition, petition, and deposition again? What further information would the court have to show that the grand jury materials are necessary for cross-examination without comparing the witness' testimony with the grand jury materials? But counsel, and not the court, should make that determination. The only practical alternative, therefore, in assuring the grand jury materials are necessary for the purpose of attacking or testing credibility is to grant counsel access and the opportunities for cross-examination under a protective order.

Congressional policy has strongly supported the private enforcement of the antitrust laws. 15 U.S.C. § 15. Just as Congress has recognized that private enforcement serves the public interest, it has provided for the private use of public enforcement which results in final adjudication on the merits. 15 U.S.C. § 16(a). A private plaintiff, however, may not take advantage of government litigation that results in *nolo* pleas or consent decrees. *Id.* Indeed,

the only practical use that private plaintiffs may gain from such government litigation is the use of grand jury materials. The use of such materials in private litigation solely for the purposes of credibility not only aids in the search for the truth and in antitrust enforcement, but materially expedites such litigation. Private antitrust litigation is necessarily complex with the attendant burdens on the administration of justice. The use of grand jury materials for credibility purposes focuses both the issues and the use of discovery and expedites the disposition of burdensome litigation.

If continued secrecy no longer serves the reasons for grand jury secrecy and if the use of grand jury materials for the purpose of cross-examination serves the interest of justice in truthful and accurate testimony as well as the public interest in effective and expeditious antitrust enforcement, then a protective order which restricts the use of grand jury materials to attacking and testing credibility independently assures the requisite necessity for the use of such materials in private antitrust litigation.

II

THE DISTRICT COURT CHARGED WITH THE SUPERVISION OF THE GRAND JURY WAS NOT COMPELLED TO REFER THE 6(e) PETITION TO THE DISTRICT IN WHICH THE ANTITRUST ACTIONS WERE PENDING

The District Court for the Central District of California was charged with the supervision of the grand jury in *United States v. Phillips, supra; United States v. Calandra*, 414 U.S. 338, 346 (1974); *Robert Hawthorne, Inc. v. Director of Internal Revenue*, 406 F. Supp. 1098 (E.D.

Pa. 1976); 18 U.S.C. § 3331, and was the proper court to rule on this Rule 6(e) petition for access to grand jury materials.

The district court for the district in which the grand jury sits and which is charged with the supervision of the grand jury clearly is at least "a" district court if not "the" only district court that is empowered to grant access to grand jury materials "preliminary to and in connection with a judicial proceeding" under Rule 6(e). *See, Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 21 F.R.D. 233 (D.D.C 1957)[6]. Any other construction would make no sense, for absent prior disclosure of grand jury materials the district court in which the grand jury sits may be the only court with the power to grant access to such materials.

Beyond the question of power, the district court charged with the supervision of the grand jury is the proper court to rule on 6(e) petitions, for it is that court that must exercise responsibility for the protection of the public interests relating to grand jury secrecy. There are several reasons why the district court charged with supervision of the grand jury has that responsibility. Even the

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[6] This petition arose under Rule 6(e) prior to that Rule's amendment effective October 1, 1977. This Court originally proposed such an amendment on April 26, 1976. 425 U.S. 1159 (1976). Congress, after postponing the effective date of that amendment, Pub. L. No. 94-349, § 1, 90 Stat. 822 (1976) pursuant to the Rules Enabling Act, 18 U.S.C. § 3771, amended this Court's proposal on July 30, 1977, Pub. L. No. 95-78, § 2(a), 91 Stat. 319 (1977) and enacted Rule 6(e) in its present form, making it effective on October 1, 1977. While the amendment as enacted by Congress changed the article "the" to "a" in referring to the court which could direct disclosure "preliminarily to or in connection with a judicial proceeding . . .", plaintiffs believe that considerations of policy and not changes in articles should govern the decision of this Court, and the legislative history indicates that this amendment was ". . . not intended to change any current practice with regard to [disclosure of information when '[d]irected by a court preliminary to or in connection with a judicial proceeding"] . . ." *See*, 123 CONG. REC. H7867 (daily ed. July 27, 1977) (remarks of Rep. Mann).

defendants concede that during the pendency of a criminal proceeding the district court with supervision over the grand jury must have control over questions of grand jury secrecy. (Petitioners' Br. at 36, n. 30) The court does not lose its responsibility at the conclusion of the criminal proceedings. The government is the party primarily, if not exclusively, responsible for advocating the public interest in grand jury secrecy. Only the district court with supervision over the grand jury will have access to the government employees directly responsible for criminal proceedings and such access can be important in determining whether there is further reason for grand jury secrecy. The defendants are wrong in contending that the reasons for further secrecy are merely matters of general policy. On the contrary, there may be particular risk of retaliation of which only the government agency in charge of the criminal prosecution is aware. Only the government may know the risk to an agent, an informer, or be sensitive to the fears of a particular witness. If the genuine interests of grand jury secrecy are to be served, it is important that the district court exercising responsibility for secrecy has direct access to the views of the government with regard to applications for disclosure. The interests of secrecy, moreover, will be best served if the responsibility for secrecy is centered in one district court and not fragmented by the happenstance of civil litigation throughout the district courts of the federal system. The question is not whether the district court charged with the supervision of the grand jury is "familiar" with grand jury proceedings. It is not the responsibility of a judge to monitor the grand jury. *United States v. Calandra, supra,* at 343. The question is which court should have responsibility for grand jury secrecy and whether the interests of grand jury secrecy are served by fragmenting that responsibility. The court charged with

the supervision of the grand jury is simply in the best position to determine whether there is any further interest in grand jury secrecy in applying the test of "particularized need" to a petition for access to grand jury materials and every lower court, including the court below, that has considered the issue, has so held. *Petrol Stops Northwest v. United States,* 571 F.2d 1127 (1978) *cert. granted sub nom., Douglas Oil Co. of California v. Petrol Stops Northwest,* 98 S. Ct. 3087 (1978); *State of Illinois v. Sarbaugh,* 552 F.2d 768 (7th Cir. 1977), *cert denied,* 434 U.S. 889 (1977); *In re April 1956 Term Grand Jury,* 239 F.2d 263, 272 (7th Cir. 1957); *Herman Schwabe, Inc. v. United Shoe Machinery Corp., supra.*

The district court charged with the supervision of the grand jury is also fully capable of determining whether the grand jury materials in question are relevant to a civil antitrust case pending in another district. The determination of relevancy is not the formidable task the defendants seek to make of it. District courts determine relevancy all the time and have a peculiar expertise in doing so. Relevancy of the materials requested is simply determined by the claims or defenses asserted in the civil actions. That is how every district court determines relevancy for the purpose of discovery. *Compare,* Rule 26(b)(1), Federal Rules of Civil Procedure, with Rule 401, Federal Rules of Evidence.

The Federal Rules of Civil Procedure envision that district courts other than the district court in which the action is pending are fully capable of determining relevancy for the purpose of discovery in a pending action. Subpoenas duces tecum, in connection with the taking of depositions in districts outside of the district in which the action is pending, are, under Rule 45, committed to the

control of the district in which such subpoenas are issued and that control includes the determination of relevancy. Rule 45(d)(1), Federal Rules of Civil Procedure. Certainly, if a district court can determine relevancy in connection with a deposition subpoena, a district court can determine relevancy in connection with a 6(e) petition for access to grand jury materials.

The defendants' elaborate arguments that issues of relevancy are so complex that they can only be determined by the district in which the civil actions are pending are simply a subterfuge and untrue. There were no problems under the Manual for Complex Litigation or of judicial economy or of abuse of discovery or of the order of discovery in determining whether grand jury materials resulting in an indictment for price fixing were relevant to civil complaints, including substantially similar charges of price fixing. But finally, the answer to the defendants' lament that the district court below should have referred the matter to the district court of Arizona in which the actions were pending, is that the district court below offered to make inquiry of the district courts in which the civil actions were pending to determine whether the judges assigned to those actions had any objection to the court below proceeding, if the defendants desired the court to do so, but the defendants expressed no such desire. The district court said:

> I have no desire to poach on Judge Walsh or Judge Frey's territory, but if they read the law the same way I do, why, they might be hesitant to allow petitioners to have access to the grand jury transcripts even though in the possession of the defendants, who presumably would say, "Well, we only got this by special dispensation but we are not at liberty to divulge it."

> I would be very glad through an overabundance of precaution, if you think it would be appropriate, to telephone Judge Walsh and Judge Frey to see if they have any objection, but it doesn't seem to me that I should relegate these people to make their application to those judges when they have taken what I think is a proper step in coming here. (A. 56)

and again the court said:

> If through any stretch of imagination I could conclude that Judge Walsh or Judge Frey would be disposed to say, "Oh, I would rather you keep your hands off and let us decide whether it is proper for them to give this information or not," I would be very glad to make that inquiry. But I have grave doubt that they would express any such concern. (A. 58)

and the defendants were silent. (A. 52-64)

If the defendants were really interested in having the judges for the district courts of Arizona in which the actions were pending determine whether there were any circumstances peculiar to the civil antitrust actions which warranted those courts being involved in the question of the plaintiffs' access to the grand jury materials, the defendants would have expressed that interest when invited by the court below to do so. The district court did not abuse its discretion in deciding the plaintiffs' 6(e) petition when the defendants had declined the court's invitation. The protective order, moreover, by restricting the use of the grand jury materials eliminated any conceivable risk to the Arizona district court's control of the civil litigation.

The proper reconciliation of the interest in grand jury secrecy and the need for the use of grand jury

materials will not be served by creating a maze of petitions to different courts at different times. There is no practical reason for one court to consider the interest of secrecy and another to consider the interest of relevancy or to require further petitions after each grand jury witness has been deposed to determine whether access to the witness' grand jury transcripts or other grand jury materials will be granted simply for the purpose of redeposing the witness so that the witness' credibility can be attacked and tested with the use of such materials. Long ago this Court provided that the Federal Rules of Civil Procedure should be "construed to secure the just, speedy, and inexpensive determination of every action," Rule 1, Federal Rules of Civil Procedure. The order of the district court below, unlike the circuitous route proposed by the defendants, made a material contribution to the achievement of those goals.

III

THE DEFENDANTS HAD NO STANDING TO CHALLENGE AN ORDER GRANTING ACCESS TO GRAND JURY MATERIALS UNDER RULE 6(e) AFTER CRIMINAL PROCEEDINGS HAD CONCLUDED

The defendants did not petition to intervene before the district court below, but merely appeared as self-styled "real parties in interest" in opposition to the Rule 6(e) petition. (A. 90) The plaintiffs contended the defendants had no standing to challenge the district court's order granting access to grand jury materials under Rule 6(e) after the criminal proceedings had concluded. The Ninth Circuit rejected plaintiffs' contention. (A. 2-4) The circuits are divided on the issue. The Ninth and Seventh Circuits have held that defendants to a concluded criminal

proceeding have standing to challenge an order under Rule 6(e) granting access to grand jury materials. *Petrol Stops Northwest v. United States,* 571 F.2d 1127 (1978), *cert. granted sub nom., Douglas Oil Co. of California v. Petrol Stops Northwest,* 98 S. Ct. 3087 (1978); *State of Illinois v. Sarbaugh,* 552 F.2d 768 (7th Cir. 1977), *cert. denied,* 434 U.S. 889 (1977). The Third Circuit has squarely held to the contrary. *United States v. American Oil Co.,* 456 F.2d 1043 (3d Cir. 1972).

The Third Circuit is correct. Grand jury secrecy is a matter of public interest, not private right. It would unreasonably burden the administration of Rule 6(e) to hold that defendants or grand jury witnesses to a concluded criminal proceeding have private standing to challenge petitions for access to grand jury materials. Would each grand jury witness or each defendant be entitled to notice and an opportunity to be heard every time a Rule 6(e) petition for access is filed? That type of administrative burden is unnecessary. The government as the prosecutor is the party charged with the adversarial responsibility in protecting the interest served by grand jury secrecy. Indeed, the prohibitions of Rule 6(e) only run to the government. The rule now specifically provides that only government personnel are covered by the obligations of secrecy imposed by the rule, and the district court's order as any order under Rule 6(e) was directed to the government who had possession of the grand jury materials.

The Third Circuit decision is supported by this Court's decision in *United States v. Calandra,* 414 U.S. 338 (1974). In *Calandra* this Court held a witness had no standing to invoke the exclusionary rule before a grand jury and refuse to answer questions on the ground the inquiry was

the product of an unlawful search and seizure. This Court reached that holding on the ground that the exclusionary rule was a matter of constitutional remedy rather than private right. If a witness before a grand jury lacks standing to invoke the exclusionary rule, a defendant to a concluded criminal proceeding necessarily lacks standing to raise considerations of grand jury secrecy in opposition to a petition for access to grand jury materials under Rule 6(e).

CONCLUSION

The order of the district court properly reconciled the competing interest of secrecy and truth by granting plaintiffs' counsel access to relevant grand jury materials already in the defendants' possession under a protective order restricting the use of such materials for the necessary purpose of attacking or testing credibility, and the judgment of the court of appeals, therefore, should be affirmed.

Dated this 19th day of October, 1978.

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APPENDIX

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *Plaintiff,* *vs.* PHILLIPS PETROLEUM COMPANY and DOUGLAS OIL COMPANY OF CALIFORNIA, *Defendants.*	Criminal No. 75-377-MML BILL OF PARTICULARS

On March 19, 1975, the indictment in this case was returned naming as defendants Phillips Petroleum Company (Phillips), Douglas Oil Company of California (Douglas), Powerine Oil Company (Powerine), Fletcher Oil & Refining Company (Fletcher), Golden Eagle Refining Company, Inc. (Golden Eagle) and MacMillan Ring-Free Oil Company, Inc. (MacMillan). Powerine, Fletcher, Golden Eagle and MacMillan pled nolo contendere and have been sentenced. The defendants moved for a Bill of Particulars on May 21, 1975. The government has voluntarily agreed to provide responses to many of the

requests made by the defendants and has objected to answering others in its Memorandum filed June 11, 1975. The Court has ordered that such responses be filed, in accordance with the government's offer and objections, on or before August 29, 1975.

Following are the government's responses to the defendants' Request for Particulars based on the information available to the government at the present time and in accordance with its offer and objections. In proving its case at trial, the government will rely upon the totality of events and circumstances to evidence the combination and conspiracy charged. Among these events and circumstances are the contacts between the defendants and co-conspirators and the fact that they have performed acts which they combined and conspired to do. The government reserves the right to amend this Bill of Particulars or to file a supplemental Bill at any time, subject to such conditions as justice requires as provided in Rule 7(f) of the Federal Rules of Criminal Procedure.

Each of the defendants' requests for particulars to be answered will be set forth followed by the government's response to the specific request.

Defendants' Request A-1

1. Please identify each of the "various other corporations, firms and individuals, not made defendants" which are referred to as "co-conspirators" in paragraph 8 of the indictment (hereafter the "alleged co-conspirators").

Response to Defendants' Request A-1

The following corporations, not named as defendants in the indictment, are those referred to as "co-conspirators" as are presently known to the government.

Gulf Oil Corporation
Signal Oil and Gas Company
(now known as Burmah Oil and Gas Company)
Seaside Oil Company
(formerly a wholly owned subsidiary of Phillips, later merged into Phillips)

The following individuals are those co-conspirators, presently known to the government, through which the defendants formed, performed and furthered the offense charged in the indictment.

Co-Conspirator	Affiliation
Claude Hendrix	Phillips Petroleum Company
S. R. Lindstrom	Phillips Petroleum Company
William J. Sinclair	Phillips Petroleum Company
John Guy	Phillips (Seaside)
John J. Stanko	Douglas Oil Company of California
Donald McNutt	Douglas Oil Company of California
William L. Martin, II	Douglas Oil Company of California
George Edward Clark	Douglas Oil Company of California
George Hopwood	Douglas Oil Company of California
Russell L. Ridout	Douglas Oil Company of California
Harry R. Rothschild, Jr.	Powerine Oil Company
Peter B. Rothschild	Powerine Oil Company
Edward J. Barnes	Powerine Oil Company
Kenneth B. Galligan	Powerine Oil Company
Jack Keane	Powerine Oil Company
James S. Enge (after 3-71)	Powerine Oil Company

Walter A. Juergens	Fletcher Oil & Refining Company
Edwin H. Anderson, Jr.	Fletcher Oil & Refining Company
Larry Delpit	Fletcher Oil & Refining Company
Bertram Ault	Golden Eagle Refining Company, Inc.
Horace G. McKay	Golden Eagle Refining Company, Inc.
Frank L. Randall	Golden Eagle Refining Company, Inc.
Eugene McDaniels	MacMillan Ring-Free Oil Company
James S. Enge (until 3-71)	MacMillan Ring-Free Oil Company

The following individuals are the co-conspirators presently known to the government through whom the corporate co-conspirators participated in the offense charged in the indictment.

Individual	Affiliation
Eugene Eisemann	Gulf Oil Corporation
Herbert Wetzler	Gulf Oil Corporation
James B. Fowler	Signal Oil and Gas Company
Richard Brehme	Signal Oil and Gas Company
George Sturges	Signal Oil and Gas Company

The last known addresses of the above individuals are indicated on Appendix A attached.

Defendants' Request A-2

2. Please identify each statement, communication, act or other conduct of each alleged co-conspirator allegedly

"in furtherance" of "the offense charged" in the indictment, or by which such co-conspirator allegedly "participated" in "the offense charged" in the indictment.

Response to Defendants' Request A-2

A. General Conspiratorial Conduct Throughout the Period Covered by the Indictment

Each defendant and co-conspirator identified in Response A-1 participated in various types of conduct in the formation and furtherance of the offense charged in the indictment. Such conduct included the following: telephone conversations, informal luncheon gatherings at various restaurants in Southern California, social encounters at private clubs (such as the Jonathan Club in Los Angeles), communications carried out at trade association gatherings and clubs, other meetings, and written correspondence.

Within the period covered by the indictment, the co-conspirators and the defendants communicated information to each other during the course of the conduct described above regarding both prospective and past price movements for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area. They exchanged information regarding market conditions of rebrand gasoline such as price and supply. They discussed the desirability of receiving higher prices for rebrand gasoline sold by the defendants in the Western area. They agreed with each other as to which defendants would follow a price increase on rebrand gasoline instituted by another defendant for the Western area, the order in which they would implement the increase and the date the increase would be effectuated. As each defendant raised its rebrand gasoline prices in the Western area, a co-conspirator would notify representatives of the other defendants. The co-

conspirators refused to supply new customers or sell greater than normal quantities to shared customers until all of the defendants and co-conspirators had implemented the agreed-upon price increases in the Western area.

B. Conspiratorial Conduct Prior to September 1970

Prior to September 1970, each defendant and co-conspirator participated in exchanges of information regarding projected or implemented price increases in the Western area for rebrand gasoline for the purpose of increasing, fixing, stabilizing and maintaining such prices. Exchanges were made at meetings and by telephone. All of these exchanges are currently unknown to the government, as are all the details of other exchanges. To the extent that details are available, they are set forth below.

DATE	PARTICIPANTS	PLACE
1-10-69	Wetzler (Gulf) Brehme (Signal)	Yankee Whaler
1-17-69	Wetzler (Gulf) Keane (Powerine)	Statler Hilton
2-28-69	Hendrix (Phillips) Wetzler (Gulf)	Century House
5-27-69	Keane (Powerine) Wetzler (Gulf)	Nicola's
10-29-69	Keane (Powerine) Wetzler (Gulf)	Lunch
11-21-69	Wetzler (Gulf) Brehme (Signal)	Lunch at Century House
1-21-70	Anderson (Fletcher Enge (MacMillan)	Jonathan Club
2-09-70	Anderson (Fletcher) Enge (MacMillan)	Jonathan Club

DATE	PARTICIPANTS	PLACE
3-10-70	Anderson (Fletcher) Barnes (Powerine)	Tasman Sea San Pedro
3-12-70	Anderson (Fletcher) Barnes (Powerine)	Jonathan Club
4-08-70	Sinclair (Phillips) Ault (Golden Eagle) McKay (Golden Eagle)	Lunch at Jonathan Club
4-13-70	Wetzler (Gulf) Brehme (Signal)	Lunch at Senor Pico
4-16-70	Keane (Powerine) Juergens (Fletcher) Anderson (Fletcher)	Saddleback Inn
4-20-70	Delpit (Fletcher) McKay (Golden Eagle)	Petroleum Club
4-20-70	McNutt (Douglas) Anderson (Fletcher) Barnes (Powerine)	Lakeside Country Club, No. Hollywood
4-21-70	Stanko (Douglas) McDaniels (MacMillan) Clark (Douglas)	Jonathan Club
4-21-70	Anderson (Fletcher) Barnes (Powerine)	Jonathan Club
4-28-70	McDaniels (MacMillan) Barnes (Powerine)	Jonathan Club
4-28-70	Keane (Powerine) Wetzler (Gulf)	Occidental Tower
4-29-70	McKay (Golden Eagle) Ault (Golden Eagle) Clark (Douglas)	Unknown
4-30-70	McDaniels (MacMillan) Barnes (Powerine)	Jonathan Club

DATE	PARTICIPANTS	PLACE
5-01-70	Wetzler (Gulf) Hendrix (Phillips)	Yamato
5-07-70	McDaniels (MacMillan) Delpit (Fletcher)	Lunch at Jonathan Club
5-15-70	Anderson (Fletcher) Barnes (Powerine)	Chez Edward
5-19-70	Sinclair (Phillips) Stanko (Douglas) Clark (Douglas)	Unknown
5-21-70	Anderson (Fletcher) McNutt (Douglas)	Jolly Knight Garden Grove, CA
5-22-70	Anderson (Fletcher) Clark (Douglas)	Jonathan Club
5-26-70	McDaniels (MacMillan) Clark (Douglas)	Jonathan Club
6-05-70	Anderson (Fletcher) Clark (Douglas)	Jonathan Club
6-22-70	McDaniels (MacMillan) Barnes (Powerine)	Jonathan Club
7-02-70	McDaniels (MacMillan) Clark (Douglas)	Jonathan Club
7-10-70	McDaniels (MacMillan) Barnes (Powerine)	Jonathan Club
7-21-70	Anderson (Fletcher) Enge (MacMillan)	Tasman Sea San Pedro
8-05-70	McDaniels (MacMillan) Clark (Douglas)	Jonathan Club
8-06-70	Clark (Douglas) Anderson (Fletcher)	Jonathan Club

DATE	PARTICIPANTS	PLACE
8-12-70	Galligan (Powerine) Juergens (Fletcher) Keane (Powerine)	King's Retreat Whittier
8-17-70	Anderson (Fletcher) Clark (Douglas) Stanko (Douglas)	Jonathan Club
8-18-70	McDaniels (MacMillan) Barnes (Powerine)	Jonathan Club
8-19-70	Juergens (Fletcher) Fowler (Signal) Delpit (Fletcher)	Perino's
8-21-70	Wetzler (Gulf) Keane (Powerine)	Yamato
8-28-70	McDaniels (MacMillan) Delpit (Fletcher) Anderson (Fletcher)	Hollandease

In further detail, Jack Keane (Powerine) had telephone conversations and meetings with S. R. Lindstrom (Phillips) at the Petroleum Club in Los Angeles and elsewhere during which they discussed Phillips' and Powerine's prices and other terms of sale to their respective customers, as well as general marketing conditions, for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area. This type of conversation occurred prior to September 1970, and thereafter, the exact dates of which are unknown at the present time. Keane had similar conversations with Herbert Wetzler (Gulf), Horace McKay (Golden Eagle), Frank Randall (Golden Eagle), Walter Juergens (Fletcher), Edwin Anderson (Fletcher), George Martin (Douglas) and Richard Brehme (Signal). During these conversations the partici-

pants exchanged pricing information they obtained during previous conversations with representatives of the other defendants and co-conspirators.

Eugene McDaniels (MacMillan) and John J. Stanko (Douglas) had several conversations prior to September 1970, and thereafter, during which Stanko advised McDaniels that Douglas would be increasing its wholesale price for rebrand gasoline in the Western area. Jim Enge (MacMillan) had similar conversations with G. E. Clark (Douglas).

George Hopwood (Douglas) had several meetings and telephone conversations with Edwin Anderson during which Hopwood inquired as to what Fletcher would do if Douglas increased its wholesale gasoline price to unbranded customers in the Western area. Hopwood had similar conversations with Richard Brehme (Signal). These conversations occurred throughout 1969, prior to September 1970, and thereafter, the exact dates and places being unknown to the Government at the present time.

Richard Brehme (Signal) exchanged information regarding impending price increases on rebrand gasoline in the Western area with Walter Juergens (Fletcher), William Martin (Douglas), George Hopwood (Douglas) and Claude Hendrix (Phillips) regularly during 1969, prior to September 1970, and thereafter, for the purpose of increasing, fixing, stabilizing, and maintaining such prices.

Larry Delpit (Fletcher) had frequent conversations with G. E. Clark (Douglas), Donald McNutt (Douglas), James Enge (MacMillan), Edward Barnes (Powerine), S. R. Lindstrom (Phillips) and George Sturges (Signal) during 1969, prior to September 1970, and thereafter, at which future price increases, general market conditions,

and each corporate defendant and co-conspirator's probable reaction to price increases by the other were discussed for the purpose of increasing, fixing, stabilizing, and maintaining rebrand gasoline prices in the Western area. These conversations occurred frequently, both over the telephone and during luncheon meetings, the exact times and places of which are not known to the Government except that many of these discussions took place at the Petroleum Club.

Ken Galligan of Powerine Oil Company had many luncheons and other meetings with representatives of various defendants and co-conspirators prior to September 1970, and thereafter, where the subject of increasing the price of rebrand gasoline in the Western area was discussed for the purpose of increasing, fixing, stabilizing, and maintaining such prices.

Jack Keane of Powerine also had many luncheons, telephone conversations and other meetings with defendants and co-conspirators prior to September 1970 and thereafter. It was a common practice for Keane and Wetzler to have lunch together where market conditions and the feasibility of increasing prices for rebrand gasoline to be sold in the Western area were discussed.

Additional communications in furtherance of the offense took place prior to September 1970 among at least some of the defendants and co-conspirators in the Petroleum Club in Los Angeles where confirmations on proposed price increases on rebrand gasoline to be sold in the Western area were acknowledged.

The defendants and co-conspirators conducted additional activity in furtherance of the conspiracy over the telephone. For example, John Guy (Phillips (Seaside)) called Jack Keane (Powerine) on occasion prior to Sep-

tember 1970, and thereafter, to obtain Powerine's rack price so as to aid in increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area.

Typically when a defendant or co-conspirator decided to increase its price, it would notify its customers of the impending price raise and at the same time notify its competitors. For example Jack Keane (Powerine) would call Wetzler (Gulf), Juergens or Anderson of Fletcher, McKay or Randall of Golden Eagle, Brehme of Signal, Martin of Douglas and Guy of Seaside (Phillips). Other telephone calls were exchanged among the defendants and co-conspirators prior to September 1970 and thereafter to ascertain that each would follow through in effectuating price increases and to let one another know when such move had been effectuated. One defendant or co-conspirator would telephone another to relate the news; for example, Keane would call Wetzler and Wetzler would then call Martin. The dates, places and participants in some of these telephone calls are contained in the records of defendants and co-conspirators in the government's possession, which records the government will make available upon request.

A meeting was held in spring or summer of 1970, the exact date and place of which is unknown, at which representatives of at least Powerine, Phillips, Douglas and Gulf were present and discussed the generally depressed market conditions in the wholesale gasoline market and the desirability of increasing the wholesale price of rebrand gasoline sold in the Western area. The individuals who attended this meeting are not known except for Harry R. Rothschild (Powerine) and John J. Stanko (Douglas).

All the exchanges of information set forth above were either for the purpose of forming the conspiracy or were

in furtherance thereof, the exact purpose currently being unknown, and created an atmosphere of trust among the defendants and co-conspirators which facilitated formation and/or furtherance of the conspiracy.

C. Conspiratorial Conduct In September 1970

Peter Rothschild (Powerine) had telephone conversations and meetings with S. R. Lindstrom (Phillips) at Rothschild's office in Santa Fe Springs and elsewhere during which they discussed Phillips' and Powerine's prices and other terms of sale to their respective customers, as well as general marketing conditions, for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area. This type of conversation occurred prior and subsequent to August 1970, the exact dates of which are unknown at the present time. Keane (Powerine) had similar conversations with Herbert Wetzler (Gulf), Horace McKay (Golden Eagle), Frank Randall (Golden Eagle), Walter Juergens (Fletcher), Edwin Anderson (Fletcher), George Martin (Douglas) and Richard Brehme (Signal).

Keane (Powerine) confirmed the agreements between Rothschild and Lindstrom during telephone conversations and meetings with Lindstrom at the Petroleum Club in Los Angeles. During these conversations the participants exchanged pricing information they obtained during previous conversations with representatives of the other defendants and co-conspirators for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area.

Eugene McDaniels (MacMillan) and John J. Stanko (Douglas) had several conversations prior and subsequent to August 1970 during which Stanko advised McDaniels

that Douglas would be increasing its wholesale price for rebrand gasoline in the Western area. James Enge (MacMillan) had similar conversations with G. E. Clark (Douglas).

George Hopwood (Douglas) had several meetings and telephone conversations with Edwin Anderson (Fletcher) during which Hopwood inquired as to what Fletcher would do if Douglas increased its wholesale gasoline price to unbranded customers in the Western area. Hopwood had similar conversations with Richard Brehme. These conversations occurred prior and subsequent to August 1970, the exact dates and places being unknown to the government at the present time.

Richard Brehme (Signal) exchanged information regarding impending price increases on rebrand gasoline in the Western area with Walter Juergens (Fletcher), William Martin (Douglas), George Hopwood (Douglas), Claude Hendrix (Phillips) and Herbert Wetzler (Gulf) regularly prior and subsequent to August 1970 for the purpose of increasing, fixing, stabilizing and maintaining such prices.

Larry Delpit (Fletcher) had frequent conversations with G. E. Clark (Douglas), Donald McNutt (Douglas), James Enge (MacMillan), Edward Barnes (Powerine), S. R. Lindstrom (Phillips) and George Sturges (Signal) prior and subsequent to August 1970 at which future price increases, general market conditions, and each corporate defendant's and co-conspirator's probable reaction to price increases by the other were discussed for the purpose of increasing, stabilizing and maintaining rebrand gasoline prices in the Western area. These conversations occurred frequently, both over the telephone and during luncheon meetings, the exact times and places of which are not

known to the Government except that many of these discussions took place at the Petroleum Club.

Ken Galligan of Powerine Oil Company had many luncheons and other meetings with representatives of various defendants and co-conspirators prior and subsequent to August 1970, where the subject of increasing the price of rebrand gasoline in the Western area was discussed for the purpose of increasing, fixing, stabilizing and maintaining such prices.

Jack Keane of Powerine also had many luncheons, telephone conversations and office meetings with defendants and co-conspirators prior and subsequent to August 1970. It was a common practice for Keane and Wetzler to have lunch together where market conditions were discussed, as was the feasibility of increasing prices for rebrand gasoline to be sold in the Western area.

Additional communications in furtherance of the offense also took place prior and subsequent to August 1970 among at least some of the defendants and co-conspirators in the Petroleum Club in Los Angeles where confirmations on proposed price increases on rebrand gasoline to be sold in the Western area were acknowledged.

The defendants and co-conspirators engaged in additional activity in furtherance of the conspiracy over the telephone. For example, John Guy (Phillips (Seaside)) called Jack Keane (Powerine) on occasion prior and subsequent to August 1970 to obtain Powerine's rack price so as to aid in increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area. Other phone calls were exchanged among the defendants and co-conspirators prior and subsequent to August 1970 to ascertain that each would follow through in effectuating the increase

and to let one another know when such move had been effectuated. One defendant or co-conspirator would telephone another to relate the news; for example, Keane called Wetzler and Wetzler would then call Martin. The dates, places, and participants in these phone calls are contained in records of defendants and co-conspirators in the government's possession, which records the government will make available upon request.

Other conversations occurred in September 1970 for the purpose either of forming or furthering the conspiracy to affect the price of rebrand gasoline in the Western area. The government is not aware of the exact time and place of each of these conversations, except as follows:

Peter Rothschild (Powerine) had a telephone conversation in his office with S. R. Lindstrom (Phillips) and received assurances that Phillips would increase its price.

Either Harry R. Rothschild or Edward Barnes of Powerine spoke with John J. Stanko (Douglas) who indicated that Douglas Oil Company would be increasing prices.

Kenneth Galligan or Jack Keane of Powerine telephoned Frank Randall or Horace McKay of Golden Eagle who stated in substance that Golden Eagle's prices would be increased if the others increased their respective prices.

Kenneth Galligan or Jack Keane had a telephone conversation with either Edwin Anderson or Walter Juergens of Fletcher who stated in substance that Fletcher would increase its prices if Douglas increased its prices.

Several meetings were held during the Pacific Oil Conference held at the Nugget Motor Lodge on September 23, 24, 25, 1970 at Sparks, Nevada, involving the defendants

and co-conspirators. Participants known to the government were Galligan (Powerine), Juergens (Golden Eagle), Anderson (Fletcher), Hopwood (Douglas), Guy (Seaside) and Randall (Golden Eagle). On this occasion, price increases to be effectuated by the defendants and co-conspirators in October 1970 for rebrand gasoline for the Western area were discussed and agreed upon. Galligan (Powerine) approached Hopwood (Douglas), on or about September 24, 1970 in a hospitality suite hosted by the Douglas Oil Company located in the Nugget Motor Lodge in Sparks, Nevada, during the Pacific Oil Conference, and asked Hopwood, in effect, if the Douglas Oil Company was intending to increase the price of gasoline. Hopwood placed a call to Douglas' offices in Los Angeles and subsequently replied that Douglas would be going along with the price increase. Galligan then confirmed the impending price increase with Juergens or Anderson of Fletcher, Guy of Seaside (Phillips) and Randall of Golden Eagle. He then called Powerine's offices to inform Peter and Harry R. Rothschild of the results of his activities.

Other meetings among the co-conspirators in September 1970 for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area include:

DATE	PARTICIPANTS	PLACE
9-04-70	Anderson (Fletcher) Enge (MacMillan)	Charlie Brown's
9-04-70	McDaniels (MacMillan) Clark (Douglas Stanko (Douglas)	Jonathan Club
9-07-70	McDaniels (MacMillan) Sturges (Signal)	Mediterrania

DATE	PARTICIPANTS	PLACE
9-09-70	Juergens (Fletcher) Anderson (Fletcher) Galligan (Powerine)	Saddleback Inn
9-11-70	Wetzler (Gulf) Keane (Powerine)	Saddleback Inn
9-15-70	Enge (MacMillan) Delpit (Fletcher) Clark (Douglas)	Marcus
9-15-70	McDaniels (MacMillan) Anderson (Fletcher)	Paul Young Washington
9-15-70	McDaniels (MacMillan) Barnes (Powerine)	Embers Washington
9-22-70	Barnes (Powerine) Stanko (Douglas) Clark (Douglas)	Jonathan Club
9-22-70	Enge (MacMillan) Clark (Douglas)	Jonathan Club
9-22-70	Wetzler (Gulf) Keane (Powerine)	Yamato's
9-23-70	Sinclair (Phillips) Ault (Golden Eagle)	Blarney Castle
9-23-70	McDaniels (MacMillan) Clark (Douglas)	L.A. Hilton
9-24-70	Barnes (Powerine) Stanko (Douglas) Clark (Douglas)	Jonathan Club
9-25-70	Barnes (Powerine) Sinclair (Phillips)	Jonathan Club
9-26-70	Sinclair (Phillips) Clark (Douglas)	USC-Oregon at Coliseum

DATE	PARTICIPANTS	PLACE
9-28-70	Delpit (Fletcher) Sturges (Signal)	Petroleum Club
9-30-70	Sinclair (Phillips) Delpit (Fletcher)	Blarney Castle
9-30-70	McDaniels (MacMillan) Galligan (Powerine)	Lunch

D. Conspiratorial Conduct Subsequent to September 1970

The government has agreed to provide general particulars only concerning conspiratorial conduct performed by the defendants and co-conspirators subsequent to the formation of their conspiracy. While the exact date of such formation is currently unknown, the conspiracy was in existence as of September 25, 1970. Consequently, the statements provided below are general particulars concerning what occurred subsequent to September 1970 and do not constitute the details of the government's evidence in response to the defendants' improper requests therefor.

PARTICULARS

Peter Rothschild of Powerine had telephone conversations and meetings with S. R. Lindstrom (Phillips) during which they discussed Phillips' and Powerine's prices and other terms of sale to their respective customers, as well as general marketing conditions, for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area. This type of conversation occurred prior and subsequent to September 1970, the exact dates of which are unknown at the present time. Keane (Powerine) confirmed the agreements between

Rothschild and Lindstrom during telephone conversations and meetings with Lindstrom at the Petroleum Club in Los Angeles.

Typically when a defendant or co-conspirator decided to increase its price prior and subsequent to September 1970, he or it would notify its customers of the impending price raise by telephone and at the same time call its competitors. For example Jack Keane (Powerine) would call Wetzler (Gulf), Juergens or Anderson of Fletcher, McKay or Randall of Golden Eagle, Brehme of Signal, Martin of Douglas and Guy of Seaside (Phillips). During these conversations the participants exchanged pricing information they obtained during previous conversations with representatives of the other defendants and co-conspirators.

Eugene McDaniels (MacMillan) and John J. Stanko (Douglas) had several conversations prior and subsequent to September 1970 during which Stanko advised McDaniels that Douglas would be increasing its wholesale price for rebrand gasoline in the Western area but would not increase Douglas' price to MacMillan until MacMillan was able to increase its rebrand price. Jim Enge (MacMillan) had similar conversations with G. E. Clark (Douglas).

George Hopwood (Douglas) had several meetings and telephone conversations with Edwin Anderson (Fletcher) during which Hopwood inquired as to what Fletcher would do if Douglas increased its wholesale gasoline price to unbranded customers in the Western area. Hopwood had similar conversations with Richard Brehme (Signal). These conversations occurred prior and subsequent to September 1970, the exact dates and place being unknown to the Government at the present time.

Richard Brehme (Signal) exchanged information regarding impending price increases on rebrand gasoline

in the Western area with Walter Juergens (Fletcher), William Martin (Douglas), George Hopwood (Douglas) and Claude Hendrix (Phillips) regularly prior and subsequent to September 1970 for the purpose of increasing, fixing, stabilizing and maintaining such prices.

Larry Delpit (Fletcher) had frequent conversations with G. E. Clark (Douglas), Donald McNutt (Douglas), James Enge (MacMillan and Powerine), Edward Barnes (Powerine), S. R. Lindstrom (Phillips) and George Sturges (Signal) prior and subsequent to September 1970 at which future price increases, general market conditions, and each corporate defendant's and co-conspirator's probable reaction to price increases by the other were discussed for the purpose of increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area.

These conversations occurred frequently, both over the telephone and during luncheon meetings, all of which the exact times and places are not known to the government. Typical examples of such meetings include the following:

DATE	PARTICIPANTS	PLACE
10-01-70	McDaniels (MacMillan) Stanko (Douglas) Clark (Douglas)	Jonathan Club
10-01-70	Delpit (Fletcher) Sinclair (Phillips) Lindstrom (Phillips)	Unknown
10-02-70	Stanko (Douglas) Barnes (Powerine)	Breakfast at Jonathan Club
10-03-70	Sinclair (Phillips) Clark (Douglas)	Dinner at Lafittes
10-05-70	Delpit (Fletcher) Lindstrom (Phillips)	Unknown

DATE	PARTICIPANTS	PLACE
10-06-70	McDaniels (MacMillan) Delpit (Fletcher)	Lunch
10-06-70	Anderson (Fletcher) Enge (MacMillan)	Jonathan Club
10-06-70	Stanko (Douglas) Barnes (Powerine)	Jonathan Club
10-07-70	Enge (MacMillan) Clark (Douglas)	Jonathan Club
10-08-70	Delpit (Fletcher) Clark (Douglas)	Petroleum Club
10-08-70	Stanko (Douglas) Enge (MacMillan)	Jonathan Club
10-08-70	Lindstrom (Phillips) Harry R. Rothschild (Powerine)	Dinner at Rueben E. Lee
during week of 10-12-70 thru 10-16-70	Ault (Golden Eagle) Sinclair (Phillips)	Lunch
10-12-70	Enge (MacMillan) McDaniels (MacMillan) Clark (Douglas) Stanko (Douglas)	Jonathan Club
10-14-70	Sinclair (Phillips) Ault (Golden Eagle) McKay (Golden Eagle)	Brown Derby
10-14-70	Anderson (Fletcher) Clark (Douglas) Stanko (Douglas)	Jonathan Club
10-16-70	Enge (MacMillan) Delpit (Fletcher)	Petroleum Club

DATE	PARTICIPANTS	PLACE
10-17-70	Anderson (Fletcher) Delpit (Fletcher) Sinclair (Phillips)	U.S.C. v. Washington at Coliseum
10-19-70	McDaniels (MacMillan) Barnes (Powerine)	Jonathan Club
10-19-70	Stanko (Douglas) Barnes (Powerine)	Jonathan Club Breakfast
10-20-70	Anderson (Fletcher) Clark (Douglas)	Jonathan Club
10-22-70	Wetzler (Gulf) Keane (Powerine)	Yamato
10-26-70	McDaniels (MacMillan) Barnes (Powerine)	Lunch
10-28-70	Wetzler (Gulf) Galligan (Powerine)	Century House
10-30-70	Anderson (Fletcher) Randall (Golden Eagle)	Jonathan Club
11-01-70	McDaniels (MacMillan) Keane (Powerine)	Jonathan Club
11-03-70	Lindstrom (Phillips) Clark (Douglas)	Petroleum Club
11-03-70	Anderson (Fletcher) Clark (Douglas) Barnes (Powerine)	Jonathan Club
11-03-70	Keane (Powerine) Wetzler (Gulf)	Luau
11-04-70	Enge (MacMillan) Clark (Douglas)	Jonathan Club
11-06-70	Barnes (Powerine) McDaniels (MacMillan)	The Cove

DATE	PARTICIPANTS	PLACE
11-10-70	McDaniels (MacMillan) Anderson (Fletcher)	Jonathan Club
11-11-70	Wetzler (Gulf) Keane (Powerine)	East Los Angeles
11-11-70	Stanko (Douglas) Barnes (Powerine) Clark (Douglas)	Jonathan Club Tap Room
11-11-70	Lindstrom (Phillips) Sturges (Signal)	Petroleum Club
11-12-70	Sinclair (Phillips) Barnes (Powerine)	Unknown
11-12-70	Enge (MacMillan) Barnes (Powerine)	Jonathan Club Breakfast
11-12-70	Sinclair (Phillips) Barnes (Powerine) Lindstrom (Phillips) Clark (Douglas)	Jonathan Club Grill Room
11-13-70	Enge (MacMillan) Galligan (Powerine) Keane (Powerine)	Petroleum Club
during week of		
11-15-70	Ault (Golden Eagle) Stanko (Douglas)	Americana Hotel New York
11-15-70	Delpit (Fletcher) Clark (Douglas)	New York
11-16-70	Anderson (Fletcher) Clark (Douglas)	Kismet Lounge New York
11-17-70	McDaniels (MacMillan) Anderson (Fletcher)	New York
11-17-70	McDaniels (MacMillan) Clark (Douglas)	New York

DATE	PARTICIPANTS	PLACE
11-18-70	McDaniels (MacMillan) Delpit (Fletcher)	Unknown
11-20-70	Enge (MacMillan) Clark (Douglas)	Jonathan Club
11-22-70	Delpit (Fletcher) Enge (MacMillan) Anderson (Fletcher)	Unknown
11-23-70	Enge (MacMillan) Clark (Douglas)	Jonathan Club
11-30-70	Enge (MacMillan) Sturges (Signal)	Petroleum Club
11-30-70	Anderson (Fletcher) Barnes (Powerine)	Lunch at Cook's Steak House, L.A.
12-01-70	Enge (MacMillan) Anderson (Fletcher)	Jonathan Club
12-07-70	Eisemann (Gulf) Ault (Golden Eagle)	Lunch
12-09-70	Wetzler (Gulf) Brehme (Signal)	Century House
12-09-70	Sinclair (Phillips) Ault (Golden Eagle) McKay (Golden Eagle)	Brown Derby
12-15-70	Barnes (Powerine) Delpit (Fletcher)	Jonathan Club
12-17-70	Enge (MacMillan) Clark (Douglas)	Googie Breakfast
12-17-70	Wetzler (Gulf) Keane (Powerine)	Yamato
12-18-70	Stanko (Douglas) Barnes (Powerine)	Jonathan Club

DATE	PARTICIPANTS	PLACE
12-20-70	Enge (MacMillan) Delpit (Fletcher) Anderson (Fletcher)	Jonathan Club
12-28-70	Enge (MacMillan) Keane (Powerine)	Jonathan Club
12-29-70	Stanko (Douglas) Barnes (Powerine)	Jonathan Club
12-29-70	Delpit (Fletcher) Enge (MacMillan)	Jonathan Club
1-09-71	Anderson (Fletcher) Sinclair (Phillips) Stanko (Douglas)	Jonathan Club
1-13-71	Sinclair (Phillips) Stanko (Douglas)	Sheraton West
1-18-71	Anderson (Fletcher) Barnes (Powerine)	Jonathan Club
1-20-71	Anderson (Fletcher) Barnes (Powerine) McDaniels (MacMillan)	Statler Steak House Washington, D.C.
1-29-71	Wetzler (Gulf) Keane (Powerine)	Lunch at Century House
2-01-71	Anderson (Fletcher) Hopwood (Douglas)	Los Angeles
2-06-71	Anderson (Fletcher) Enge (MacMillan)	Anaheim
2-09-71	Anderson (Fletcher) Enge (MacMillan)	Jonathan Club
2-17-71	Anderson (Fletcher) Barnes (Powerine)	Long Beach
2-22-71	Anderson (Fletcher) Clark (Douglas)	Jonathan Club

DATE	PARTICIPANTS	PLACE
2-22-71	Wetzler (Gulf) Brehme (Signal)	Yamato
3-08-71	Anderson (Fletcher) Clark (Douglas)	Jonathan Club
3-11-71	Anderson (Fletcher) Enge (Powerine)	Unknown
3-28-71	Anderson (Fletcher) Barnes (Powerine)	Lunch
4-02-71	Wetzler (Gulf) Hendrix (Phillips)	Lunch at Senor Pico
4-15-71	Wetzler (Gulf) Keane (Powerine)	Lunch at Yamato
4-30-71	Anderson (Fletcher) Enge (Powerine)	Lumbardo's Long Beach
5-17-71	Anderson (Fletcher) Eisemann (Gulf)	Jonathan Club
5-18-71	Anderson (Fletcher) Delpit (Fletcher) Clark (Douglas) Barnes (Powerine)	Los Angeles
5-18-71	McKay (Golden Eagle) Sturges (Signal)	Lunch
6-02-71	Anderson (Fletcher) Stanko (Douglas)	Jonathan Club
6-03-71	Anderson (Fletcher) Enge (Powerine)	Saddleback Inn Norwalk
7-01-71	Wetzler (Gulf) Keane (Powerine)	Lunch
7-05-71	Anderson (Fletcher) Clark (Douglas)	Red Witch Inn Long Beach

DATE	PARTICIPANTS	PLACE
7-13-71	Anderson (Fletcher) Barnes (Powerine)	Saddleback Inn Norwalk
7-14-71	Anderson (Fletcher) McNutt (Douglas)	Jonathan Club
7-19-71	Barnes (Powerine) Clark (Douglas) McNutt (Douglas)	Unknown
7-30-71	Wetzler (Gulf) Keane (Powerine)	Yamato's

Additional communications in furtherance of the offense also took place prior and subsequent to September 1970 among at least some of the defendants and co-conspirators in the Petroleum Club in Los Angeles where confirmations on proposed price increases of rebrand gasoline to be sold in the Western area were acknowledged.

The defendants and co-conspirators engaged in additional activity in furtherance of the conspiracy over the telephone. For example, John Guy called Jack Keane on occasion prior and subsequent to September 1970 to obtain Powerine's rack price so as to aid in increasing, fixing, stabilizing, and maintaining rebrand gasoline prices in the Western area. Other phone calls were exchanged among the defendants and co-conspirators prior and subsequent to September 1970 to ascertain that each would follow through in effectuating price increases and to let one another know when such move had been effectuated. One defendant or co-conspirator would telephone another to relate the news; for example, Keane would call Wetzler and Wetzler would then call Martin.

On October 21, 1970, Ed Clark of Douglas had cocktails at the Petroleum Club with Larry Delpit of Fletcher. Clark indicated to Delpit that Douglas was going to increase the

spread between regular and premium gasoline from 2.0 to 2.2 cents and wanted Fletcher's reaction so as to aid Douglas and the other defendants and co-conspirators in increasing, fixing, stabilizing, and maintaining rebrand gasoline prices in the Western area.

McKay of Golden Eagle and Anderson of Fletcher discussed the feasibility of instituting the 2.2 differential at a luncheon meeting at the end of October 1970. It was here that McKay stated that Anderson related to him that Douglas was also intending to institute the 2.2 spread in November.

On October 27 and 28, 1970, Hand of Douglas called Guy (Phillips (Seaside)) to give Seaside advance notice of Douglas' price increase to a 2.2 cent spread between regular and premium rebrand gasoline to be sold in the Western area so as to aid in increasing, fixing, stabilizing and maintaining such prices. On October 29, 1970, there were two telephone calls placed to Powerine by Douglas for similar objectives. Galligan received a telephone call from Hopwood about this time (the week of October 20, 1970) in which Hopwood indicated that Douglas was going to increase the differential between regular and premium rebrand gasoline in the Western area to 2.2 cents.

Discussions were also had in October 1970 between Clark and McNutt of Douglas and Delpit of Fletcher about increasing the spread between regular and premium rebrand gasoline to be sold in the Western area to 2.2 cents per gallon.

On November 3, 1970, Keane and Wetzler had lunch and discussed the proposed 2.2 cent spread between regular and premium rebrand gasoline sold in the Western area. After this lunch, at approximately 2:19 p.m., Keane placed a telephone call to Martin of Douglas to convey to Martin

information on the proposed price increase so as to aid in increasing, fixing, stabilizing and maintaining rebrand gasoline prices in the Western area. On December 4, 1970, Keane and Wetzler had another lunch where the 2.2 cent spread was discussed.

On December 8, 1970, Clark (Douglas) had lunch with Sinclair of Phillips. This meeting was held to pass along information about the increase to the 2.2 cent spread between the price of regular and premium rebrand gasoline sold in the Western area so as to aid all the defendants and co-conspirators in increasing, fixing, stabilizing and maintaining prices for such gasoline in such area.

E. Price Movements Made Pursuant to the Conspiracy

In early October, 1970 each of the defendants increased the price of rebrand gasoline sold in the Western area pursuant to the conspiracy. Each of the defendants and co-conspirators did not necessarily increase its prices of rebrand gasoline to each and every one of its rebrand customers on the above dates—the dates indicated reflect a general implementation of the price increases. The date each defendant and co-conspirator increased its price and the amount of the increase is indicated below.

DATE	COMPANY	INCREASE (cents/gallon)
10-01-70	MacMillan	0.50
10-05-70	Douglas	0.30
10-05-70	Powerine	0.25
10-08-70	Fletcher	0.40
10-09-70	Gulf	0.30
10-09-70	Phillips (Seaside)	0.25
10-12-70	MacMillan	0.25
10-12-70	Phillips	0.25
10-16-70	Golden Eagle	0.30

The defendants and co-conspirators also increased the differential or "spread" between the price of premium and regular rebrand gasoline sold in the Western area from 2.0 cents per gallon to 2.2 cents per gallon, effective on the dates indicated below, pursuant to their conspiracy:

DATE	COMPANY
11-01-70	Douglas
11-09-70	Gulf
11-18-70	Fletcher
11-20-70	MacMillan
11-24-70	Phillips
11-25-70	Golden Eagle
12-02-70	Phillips (Seaside)
12-14-70	Powerine
1-05-71	Signal

Additional increases in the price of rebrand gasoline to be sold in the Western area pursuant to the conspiracy were effectuated in December, 1970 and early January, 1971 as follows (these dates reflect a general implementation of the increases):

DATE	COMPANY	INCREASE (cents/gallon)
12-05-70	Signal	0.70
12-14-70	Powerine	0.70
12-14-70	Gulf	0.25
12-21-70	Fletcher	0.60
12-22-70	Golden Eagle	0.90
12-23-70	Phillips (Seaside)	0.50
12-24-70	Douglas	0.50
12-26-70	MacMillan	0.60
12-26-70	Phillips	0.50
1-04-71	Gulf	0.25

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Kenneth Galligan withdrew from the conspiracy on April 6, 1973 by verbally disclosing its existence to the government. Documents referring to this withdrawal are the government's work product and are not subject to discovery at this time.

Defendants' Request C-1

1. Separately as to each defendant and each alleged co-conspirator, please identify each price referred to in such paragraph 12 of the indictment.

Response to Defendants' Request C-1

The government is not aware of all the prices increased, fixed, stabilized, and maintained throughout the duration of the crime by the defendants and co-conspirators. In general, however, the prices referred to are the amount of money charged per gallon of gasoline, exclusive of tax and transportation charges, by the defendants and co-conspirators for unbranded or rebrand gasoline sold in the Western area throughout the period covered by the indictment. Rebrand gasoline is gasoline which is ultimately sold under retail brand names not owned or controlled by an oil refiner. Each of the various gasoline wholesalers, including the defendants, has its own terminology for its price for rebrand gasoline such as "rack price," "spot price," "contract price," or "unbranded jobber price."

Gasoline is sold in various grades. The grades are often differentiated by research octane ratings. The two most commonly sold grades of rebrand gasoline in the Western area in 1970 and 1971 were regular, with a research octane rating of approximately 91, and premium with a research octane rating of approximately 100.

Premium gasoline normally sells at a higher price than regular gasoline. The differential between the price of a gallon of premium gasoline and a gallon of regular gasoline is sometimes known as the "spread."

"Price" as used in paragraph 12 of the indictment includes the price of regular rebrand gasoline and the price of premium rebrand gasoline.

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Defendants' Request E-1

1. Separately as to each defendant and each alleged co-conspirator, please (a) state each date upon which such person is claimed to have increased its price for rebrand gasoline pursuant to the alleged combination and conspiracy, (b) identify each product upon which the price was allegedly raised, (c) identify the price such person had charged for rebrand gasoline immediately previous to such date (hereafter "the original price"), (d) identify the new, increased price such person is alleged to have put into effect on such date (hereafter "the increased price"), (e) identify each customer to whom such person is alleged to have extended or attempted to extend the increased price on or subsequent to such date, (f) identify each writing which is alleged to indicate, imply, evidence, demonstrate or refer to either the original price or the increased price, including but not limited to each price sheet in which either the original or the increased price is indicated, implied, evidenced, demonstrated or referred to and (g) state each fact, and identify each writing, act or other conduct which is alleged to indicate, imply, evidence or demonstrate that such price was at an "artificial" or "non-competitive" level.

Response to Defendants' Request E-1

To the extent that the government currently has knowledge of the dates upon which each defendant and co-conspirator began charging the higher prices and the amounts the prices were increased pursuant to the crime charged in the indictment, such knowledge is set forth in Response A-2, Section E. The price for each grade of rebrand motor gasoline sold by each defendant and co-conspirator was increased pursuant to the crime charged in the indictment on or about the dates indicated in the response. In addition, the defendants and co-conspirators increased the price of premium rebrand gasoline by an additional 0.2 cents per gallon over that of regular rebrand gasoline on the dates indicated in Response A-2, Section E that the defendants went to a 2.2 cent "spread." Intermediate grades, those with research octane ratings between regular and premium, were increased proportionately on those dates. These prices, as well as all other prices charged by the defendants and co-conspirators for rebrand gasoline sold in the Western area during the period covered by the indictment, were at artificial and non-competitive levels because they were increased by agreement among the conspirators instead of being determined by the independent business judgment of each based upon free and unfettered competition in the marketplace.

Facts which show the conspiracy and agreement among the defendants and co-conspirators to increase prices for rebrand gasoline sold in the Western area to artificial and non-competitive levels, to the extent such facts are currently known to the government, are set forth in Response A-2 in its entirety. More particularly, facts concerning the specific price increases appearing in Section E are detailed in Sections C and D.

The specific prices charged by each defendant and co-conspirator to each of its rebrand customers, to the extent of the government's knowledge, are contained in documents of the defendants and co-conspirators which are in the government's possession and have been or will be made available for inspection and copying by the defendants subject to the restrictions ordered by the Court. Respecting the request for document identification, the Court has provided a method by which documents in the government's possession may be inspected. Therefore, the request for further specification improperly calls for the details of the government's evidence.

Defendants' Request E-2

2. Separately as to each defendant and each alleged co-conspirator, please (a) state each date upon which, or period of time during which, such person is claimed to have (i) "fixed", (ii) "stabilized" or (iii) "maintained" any price of rebrand gasoline at an "artificial" or "non-competitive" level pursuant to the alleged combination or conspiracy, (b) identify each product which such person is alleged to have (i) "fixed", (ii) "stabilized" or (iii) "maintained", (c) identify each price which such person is alleged to have (i) "fixed", (ii) "stabilized" or (iii) "maintained" upon each such date or during each such period of time for each such product, (d) separately as to each such price, identify each customer to whom such person is alleged to have extended or to have attempted to extend such price, (e) separately as to each such price, identify each writing which is alleged to indicate, imply, evidence, refer to, or demonstrate such price, including but not limited to each price-sheet in which it is alleged that such price is indicated, implied, evidenced, demonstrated or referred to, and (f) separately as to each such price,

state each fact, identify each writing, act or other conduct which is alleged to indicate, imply, evidence, or demonstrate that such price was at an "artificial" or "non-competitive" level.

Response to Defendants' Request E-2

To the extent that the government currently has knowledge of the specific dates upon which the conspirators began charging increased prices for rebrand gasoline and the amounts the prices were increased pursuant to the crime charged in the indictment, such knowledge is set forth in Response A-2, Section E. These prices, as well as all other prices charged by the defendants and co-conspirators for rebrand gasoline sold in the Western area during the period covered by the indictment, were fixed, stabilized, and maintained at artificial and non-competitive levels because they were set by agreement among the conspirators instead of being determined by the independent business judgment of each based upon free and unfettered competition in the marketplace.

Facts which show the conspiracy and agreement among the defendants and co-conspirators to fix, stabilize, and maintain prices for rebrand gasoline sold in the Western area at artificial and non-competitive levels, to the extent such facts are currently known to the government, are set forth in Response A-2 in its entirety. More particularly, facts concerning the specific price increase appearing in Section E are detailed in Sections C and D.

The non-competitive prices continue to be fixed, stabilized and maintained by the defendants and co-conspirators. On or about August 15, 1971, all prices, including the prices of rebrand gasoline, were frozen by action of the President of the United States. In November, 1971

price controls were implemented. The maximum prices of rebrand gasoline have been regulated by various agencies of the federal government continuously from then until the present day. The base prices covered by the indictment in this case upon which controls are implemented are those artificial and non-competitive prices achieved by combination and conspiracy of the defendants and co-conspirators. Consequently, the price of rebrand gasoline sold by the defendants and co-conspirators in the Western area has been at a non-competitive level pursuant to the conspiracy until the present day.

Respecting the request for document identification, the Court has provided a method by which documents in the government's possession may be inspected. Therefore, the request for further specification improperly calls for the details of the government's evidence.

Defendants' Request E-4

4. (a) Please state each means by which price competition in the sale of rebrand gasoline is claimed to have been suppressed by the alleged combination or conspiracy, and (b) separately as to each defendant and each alleged co-conspirator, state each means by which price competition in the sale of rebrand gasoline is claimed to have been suppressed by the statements, communications, acts or other conduct of such defendant or such alleged co-conspirator.

Response to Defendants' Request E-4

The government is uncertain as to the intended meaning of the word "means" in this request for particulars. However, price competition in the sale of rebrand gasoline in the Western area was suppressed by the agreement of

each of the defendants to increase the price at which it sold such gasoline and the subsequent increase in price pursuant to the agreement. In addition, price competition in the sale of rebrand gasoline in the Western area was suppressed by the agreement of the defendants to increase the spread between the prices at which they sold such regular and premium gasoline and the subsequent increase in the spread pursuant to the agreement. As a part of the agreement to increase the price of such gasoline, each of the defendants and co-conspirators agreed not to solicit the business of a customer of another defendant or co-conspirator while the price increase was being effectuated, thereby further suppressing price competition.

The details of the "means" used to accomplish these unlawful results, to the extent currently known to the government, are set forth in Response A-2 in its entirety. When an individual co-conspirator is described in the Response as having participated, his participation was also the participation of his company employer and of all the other defendants and co-conspirators.

Dated: August 29, 1975

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